No. 3845

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES C. DAVIS, as DIRECTOR GENERAL OF RAILROADS, operating the Chicago, Milwaukee & St. Paul Railway and AGENT appointed under the Transportation Act of 1920,

Plaintiff in Error,

vs.

AMERICAN SILK SPINNING COMPANY, a corporation,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF DEFENDANT IN ERROR

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BRIEF OF DEFENDANT IN ERROR

This is an action at law to recover damages for breach of a contract of carriage. The complaint is set forth at length in the transcript of record. (Rec. pp. 1-6). To the complaint an Answer was filed. (Rec. pp. 7-17). To the Answer a Reply was filed. (Rec. pp. 18-22).

The parties entered into a written stipulation

waiving a jury and agreeing to submit the case to the court without the intervention of a jury. (Rec. p. 24). At the conclusion of the trial, which lasted several days, both parties requested the court to make certain findings of fact and conclusions of law. The court, after deliberating upon the matter some time, made certain findings of fact and conclusions which are set forth in full in the transcript of record (Rec. pp. 25-34) and thereafter on December 15, 1921, the court signed the judgment in the case in favor of plaintiff (Rec. pp. 72-73). The plaintiff in error (defendant below) filed a bill of exceptions and prosecuted a writ of error to this court. The plaintiff in error has made 34 assignments of error, which are set forth in the transcript of record. (Rec. pp. 590-614).

The defendant in error believes certain of these assignments of error are unavailing to plaintiff in error on appeal to this court for the reasons hereinafter noted.

The Judicial Code (*R. S. Sec.* 649) *U. S. Compiled Stats.* 1916, *Sec.* 1587, makes provision for the trial of issues of fact by the court, as follows:

"Issues of fact in civil cases, in any circuit court, may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The findings of the court, which may be either general

or special, shall have the same effect as the verdict of a jury."

The provision of this section became inoperative as to the circuit courts on the abolition of these courts by the *Judicial Code*, *Sec.* 289, *U. S. Compiled Stats.* 1916, *Sec.* 1266, (*Act of March* 3, 1911), but were made applicable to the district courts by the transfer of the powers and duties of the circuit courts to the district courts by *Sec.* 291 *of the Judicial Code* (*Act of March* 3, 1911) *U. S. Compiled Stats.* 1916, *Sec.* 1268.

The Judicial Code makes provision for the review of cases tried by district courts without the intervention of a jury (*R. S. Sec.* 700) *U. S. Comiled Stats.* 1916, *Sec.* 1668. This section became inoperative as to trials in the circuit courts upon the abolition of those courts by *Sec.* 289 *of the Judicial Code*, (*U. S. Compiled Stats. Sec.* 1266), but were made applicable to the district courts by the transfer of the powers and duties of the circuit courts to the district courts by *Sec.* 291 *of the Judicial Code* (*Sec.* 1268 *U. S. Compiled Stats.* 1916).

By the provisions of the Judicial Code last above mentioned, the questions which may be reviewed by this court upon a writ of error are particularly specified and limited to rulings of the court in the progress of the trial, if excepted to

at the time and duly presented by a bill of exceptions, and in the event special findings be made by the trial court, the review of this court may extend to the determination of the sufficiency of the facts found to support the judgment.

Probably no other provision of the Judicial Code has been more frequently passed upon by circuit courts of appeal than the provisions of the section last above noted. If the statute is not clear in itself, then the decisions of the courts in which these provisions have been considered have made them clear. This court has several times passed upon these provisions and by its decisions has clearly pointed out what questions it will or will not pass upon in an appeal such as this.

Before referring to these decisions we deem it in order to point out the nature and character of the assignments of error which the plaintiff in error requests this court to consider. These assignments of error may be grouped as follows:

Group One. Error in admitting testimony. Into this group falls Assignment of Error No. 1, which is to the effect that the trial court erred in admitting in evidence the answer of Arthur D. Little to three certain questions asked him, the answer of Edward A. Barrier to two certain questions asked him, and the answer of Harry Albert Mereness to one

certain question asked him. These men were all witnesses for the plaintiff below and the questions asked them, as above noted, were propounded by plaintiff's attorney.

Group Two. Into this group fall Assignments of Error Nos. II to XIII, both inclusive, all of which are to the effect that the trial court erred in refusing to make certain findings of fact therein noted and requested by the defendant to the action.

Group Three. Into this group fall Assignments of Errors Nos. XIV to XVI, both inclusive, which are to the effect that the trial court erred in refusing to make certain conclusions of law requested by the defendant to the action.

Group Four. Into this group fall Assignments of Error Nos. XVII to XXIX, both inclusive, which are to the effect that the trial court erred in making certain findings of facts as therein noted. (Rec. pp. 605-612).

Group Five. Into this group fall Assignments of Error Nos. XXX to XXXIV, both inclusive, which are to the effect that the trial court erred in making certain conclusions of law therein noted and in rendering judgment against the defendant for the reason that the findings of fact as made and signed by the court are insufficient to justify the

conclusions of law and insufficient to support the judgment. (Rec. pp. 612-613).

WHAT QUESTIONS MAY BE REVIEWED BY THIS COURT IN THIS CASE

Except for the provisions of the Judicial Code expressly authorizing it, the district courts would have no jurisdiction to try a civil cause without the intervention of a jury. The code permits such a trial whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury, and provides that in a case so tried "the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." (R. S. Sec. 649, U. S. Compiled Stats. 1916, Sec. 1587). Hence, it is clear that such a trial is not one which a party is entitled to have as a matter of right. Such a trial can be had only by virtue of the statute and upon strict compliance with its terms.

The statute, with equal clearness and strictness, defines what questions may be reviewed by this court on an appeal upon a writ of error growing out of such a trial. The statute provides that "the rulings of the court in the progress of the trial of the cause, if excepted to at the time and duly presented by a bill of exceptions, may be re-

viewed upon a writ of error and when the findings of the trial court is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment of the trial court." *R. S.* 700, *U. S. Compiled Stats.* 1916, *Sec.* 1668. The United States Supreme Court, in the case hereafter noted, has expressly held this statute to be a limitation upon its revisory power upon a writ of error in such cases, and this court and other circuit courts of appeal in the cases hereinafter noted have adhered to and followed the holding of the Supreme Court.

In the case of,

Stanley v. Board of Supervisors, 121 U. S. 535, 547, 30 L. Ed. 1000.

the court said:

"Several of the assignments of error presented for our consideration are to rulings of the court below upon the evidence before it; to its finding of particular facts; and to its refusal to find other facts. Such rulings are not open to review here; they can be considered only by the court below. Where a case is tried by a court without a jury, its findings upon questions of fact are conclusive here; it matters not how convincing the argument that upon the evidence the findings should have been different. * * * * And the first assignment of error is that the court erred in deciding that the plaintiff failed to establish the allegations mentioned, and the greater part of the oral argument of the plaintiff's counsel and of his printed brief was devoted to the maintenance of this proposition; which

is nothing more than that the court below found against the evidence—a question not open to review or consideration in this court. Only rulings upon matters of law when properly presented in a bill of exceptions can be considered here, in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment rendered. This limitation upon our revisory power on a writ of error in such cases is by express statutory enactment. * * * The same answer will apply to the exceptions taken to the refusal of the court to make certain additional findings. If error was thus committed, it was in not giving sufficient weight to the evidence offered—a matter determinable only in the court below."

In the case of,

Sayward v. Dexter Horton & Co. 72 Fed. 758.

this court, referring to the provisions of the Judicial Code above noted, said:

"Several of the assignments of error bring in question the sufficiency of the evidence to establish the findings of fact made by the referee and adopted by the court. It is not contended, nor does it appear, that there was absolutely no evidence upon which to base those findings. The contention is that, upon the evidence adduced, the findings should have been different. That contention can not be considered in this court. * * * Under these statutes and the established construction given them by the courts, the power of this court is limited to the determination of the question whether errors were committed by the trial court in its rulings during the progress of the trial, and whether the special findings made by the court were sufficient to support the judgment."

This court then, in support of its decision above noted, cites numerous decisions of the U. S. Supreme Court.

Again in the case of,

> *Empire State-Idaho Mining & Developing Co. v. Bunker Hill & Sullivan Mining & Concentrating Co.* 114 Fed. 417, 52 C. C. A. 219.

this court, in passing upon the question, after stating that the case was tried without a jury and resulted in certain findings of facts made by the court, and a judgment thereon in favor of the plaintiff, said:

"The record contains a bill of exceptions embracing, among other things, various assignments of error, the 2nd, 3rd, 4th and 5th of which are to the effect that the trial court erred in making certain of its findings of fact, which findings of fact so complained of these assignments of error respectively set out at large. The 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, and 20th assignments of error are to the effect that the court below erred in refusing to make certain findings of fact requested by the defendant to the action. *It is very clear that these assignments are unavailing.* Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive in the appellate court. Only rulings upon matters of law, when properly presented in a bill of exceptions, can be considered here, in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment rendered. (Here this court cites certain cases, including *Stanley v. Supervisors, supra*).

The remaining assignments of error embodied in the record relate to the question of the sufficiency of the findings of fact made by the court below to sustain the judgment given by it, which is the real, and, indeed, the only, question in the case."

In the case of,

Los Angeles Gas & Electric Corp. v. Western Gas Const. Co. 205 Fed. 707.

this court again had occasion to, and did pass upon the precise question here under consideration, and expressly held, following its former decisions in the case of *Empire State v. Bunker Hill, supra*, that this court could not and would not consider assignments of error to the effect that the court below erred in refusing to make certain findings of fact requested by the defendant or that the court below erred in making the findings of fact which it did make.

Plaintiff in error devotes the first six pages of its brief to its "Statement of the Case," and on pp. 6 to 10 of its brief may be found its "Statement of Issues." On pp. 10 and 11 of its brief may be found what it terms "Questions for Decision." On p. 11, it is stated "The plaintiff in error relies upon and will discuss all of the Assignments of Error which are as follows," which statement is followed by its "Assignments of Error" set forth in full on pages 11 to 32.

We have heretofore in this brief endeavored to classify into proper groups the thirty-four Assignments of Error upon which plaintiff in error states it relies, and all of which assignments plaintiff in error states it will discuss. A careful reading of the brief of plaintiff in error has not disclosed to us any argument whatever therein as to certain of these assignments, and such assignments as are discussed, are not discussed either in the order in which they are made, or in groups.

It is posible that the failure of the plaintiff in error to discuss numerous of its assignments of error may be considered a concession on the part of plaintiff in error that the questions raised by such assignments are not subject to review by this court.

Since the Assignments of Error logically fall into groups, as hereinbefore noted, we will endeavor to so discuss them.

GROUP I

Into this group falls Assignment of Error No. 1, which is to the effect that the trial court erred in admitting in evidence the answers of certain witnesses for plaintiff below to certain question propounded to them, as hereinafter noted.

Assignment of Error No. 1 is found on pp. 11

to 16 of the brief of plaintiff in error, in which brief there is not, so far as we have been able to discover, any argument whatsoever in support of said assignment. We are, therefore, led to the belief that plaintiff in error has concluded the question raised by its Assignment of Error No. 1 cannot, as a matter of law, be reviewed by this court, or, if reviewable, that there is not sufficient merit in it to warrant an argument, hence we will treat this assignment as having been waived by plaintiff in error. A casual reading of the questions and answers referred to in the assignment is sufficient, we think, to convince this court that the questions were proper ones to be propounded to experts and that the answers thereto constitute competent evidence.

GROUP II

Into this group fall Assignments of Error Nos. 2 to 13, inclusive, (see brief of plaintiff in error pp. 17 to 28) (Rec. pp. 596 to 604) all of which are to the effect that the trial court erred in refusing to make certain findings of fact therein noted, and requested by the defendant to the action. We do not find in the brief of the plaintiff in error any argument directed to the Assignments included in this group.

We have previously herein directed the attention of this court to the following cases:

Stanley v. Board of Supervisors, 121 U. S. 535, 547, 30 L. Ed. 1000.

Sayward v. Dexter Horton & Co. 72 Fed. 758.

Empire State Co. v. Bunker Hill Co. 114 Fed. 417, 52 C. C. A. 219.

Los Angeles Gas Co. v. Western Gas Co., 205 Fed. 707.

The decisions in the three cases last mentioned were rendered by this court. The decision of the U. S. Supreme Court in the *Stanley* case is squarely in point, as are the above noted decisions of this court. In language as clear as words can make it, these decisions say that assignments of error based upon the refusal of the trial court to make findings of particular facts are not open to review in this court, and it matters not how convincing the argument may be that upon the evidence the findings of the trial court should have been different.

We, therefore, pass without further argument all questions raised by Assignments of Error Nos. 2 to 13, inclusive, for the reason that such questions are not subject to review by this court.

GROUP III

Into this group fall Assignments of Error Nos. XIV, XV, and XVI. (brief of plaintiff in error p. 24) (Rec. pp. 604, 605) which are to the effect that the trial court erred in refusing to make certain

conclusions of law requested by the defendant to the action. The requested conclusions of law were as follows:

A. "The plaintiff herein is not the real party in interest, nor entitled by law to maintain this action," and

B. "The defendant is not, by any act or omission, guilty of any breach whatever of the contract sued on herein," and

C. "The defendant is entitled to have a judgment in its favor that the plaintiff take nothing by its action herein."

These conclusions of law, which plaintiff in error requested the court to make, are directly opposite to the conclusions of law which the court did make. Plaintiff in error excepted to the conclusions of law which the trial court did make, and its Assignments of Error Nos.XXX to XXXIV, which we have heretofore classified as falling in Group Five, are to the effect that the trial court erred in making the conclusions of law which it did make, and in rendering judgment against the defendant for the reason that the findings of fact, as made and signed by the court, are insufficient to justify the conclusions of law made by the court and insufficient to support the judgment.

We believe that all questions of law that may be reviewed by this court in this case arise out of

Assignment of Error Nos. XIV, XV, and XVI, classified by us as Group III, and Nos. XXX to XXXIV, classified by us as Group V, and for this reason we will hereinafter present our arguments on the questions of law arising out of the Assignments of Error included in Group III and Group V.

GROUP IV.

Into this group fall Assignments of Error Nos. XVII to XXIX, both inclusive, which are to the effect that the trial court erred in making certain findings of fact as therein noted. (Brief of plaintiff in error, pp. 24 to 31) (Rec. pp. 605-612).

We take the firm position that the findings of fact, as made by the trial court, are not open to review in this court. This position is sustained by the decision of the U. S. Supreme Court in the case of

Stanley v. Board of Supervisors, 121 U S. 535, 547, 30 L. Ed. 1000.

and by the decisions of this court in the following cases:

Sayward v. Dexter Horton & Co., 72 Fed. 758,

Empire State Co. v. Bunker Hill Co., 114 Fed. 417, 52 C. C. A. 219.

Los Angeles Gas Co. v. Western Gas Co., 205 Fed. 707.

In the *Stanley* case the Supreme Court said:

"Several of the assignments of error presented for our consideration are to rulings of the court below upon the evidence before it; to its findings of particular facts; and to its refusal to find other facts. Such rulings are not open to review here; they can be considered only by the court below. Where a case is tried by a court without a jury, its findings upon questions of fact are conclusive here; it matters not how convincing the argument that upon the evidence the findings should have been different. * * * * "

Plaintiff in error, however, contends that, notwithstanding these decisions, this court may review the findings of fact as made by the trial court, pointing out in its Assignments of Error included in Group IV that no evidence was introduced upon the trial to support the findings of fact to which exception is taken, which is but saying, in other words, that the findings of fact, as made by the court, are wholly unsupported by any evidence.

If this be the law, and this court deems itself possessed of jurisdiction to review the findings of fact as made by the trial court, then we desire to set forth in full the findings of fact to which exceptions have been taken by plaintiff in error, and to show, in as brief a review of the evidence as possible under the circumstances, that there is evidence to support and sustain each and every of the findings of

fact so mentioned.

The findings of fact as made by the trial court are as follows:

FINDING I

"That the plaintiff at all times hereinafter mentioned was and still is a corporation organized and existing under the laws of the State of Rhode Island, with its principal place of business in the City of Providence in said State, and is a citizen of said state."

This finding is not objected to by plaintiff in error.

FINDING II

"That the defendant at all times herein mentioned was the United State Director General of Railroads duly appointed and acting under and by virtue of an Act of Congress and at all times herein mentioned was operating as a common carrier of freight and passengers the railroad lines of the Chicago, Milwaukee & St. Paul Railway Company between the Cities of Seattle and Tacoma, Washington, and the City of Chicago, Illinois. That the Chicago, Milwaukee & St. Paul Railway Company at the times herein mentioned was and still is a corporation organized and existing under the laws of the State of Wisconsin, and is a citizen of said state."

This finding is not objected to by plaintiff in error.

FINDING III

"That on June 21st and 24th, 1918, the plain-

tiff caused to be shipped, freight prepaid, from Canton, China, 1000 bales of waste silk, of which 700 bales were consigned to the order of Messrs. Heidelbach, Ickelheimer & Co., of New York, and 300 bales to Goldman, Sachs & Co., New York, all destined to plaintiff, American Silk Spinning Company at Providence, Rhode Island. *That 500 bales were of the quality known as No. 1 Canton Steam Waste Silk" and 500 bales were of the quality known as "No. 2 Canton Steam Waste Silk."*

Plaintiff in error objected to that portion of Finding III in italics (Assigment of Error XVII) for the reason that there is no evidence to support it.

In this connection we direct the attention of the court to page 118 of the printed record, where it is shown that the witness, Frank G. Taylor was questioned and made answers as follows:

Q. "There was 1000 bales in this shipment?"

A. "1000 bales in the entire shipment."

Q. "And do you know whether or not there were two grades of the silk?"

A. "I believe there was No. 1 and No. 2."

Mr. Korte. "I think we can agree on that. That is all agreed to. There is no dispute about that."

Mr. Korte was the attorney of record for the defendant below, the plaintiff in error here, and the record, as above quoted, shows beyond dispute that there was no question as to the number of bales of each grade, it being understood throughout

the trial that 500 bales of the shipment were of the grade known as No. 1 and 500 bales of the No. 2 grade.

Further, however, we call attention to page 120 of the printed record, where the witness, Edgar W. Lownes, was questioned and made answers as follows:

Q. "Out of this shipment of a thousand bales how many bales arrived in a damaged condition?"

A. "867."

Q. "And the balance came forward sound?"

A. "Yes."

And on page 121:

Q. "Out of the 867 bales damaged how many bales were there of the number one Canton Steam Waste?"

A. "500 bales number one."

Q. "How many number two?"

A. "368 number two."

The foregoing testimony is positive and is absolutely uncontradicted and fully supports that portion of Finding of Fact No. III made by the trial court and excepted to by plaintiff in error.

FINDING IV

"That the said 1000 bales of waste silk were delivered at Canton, China, to Osaka Shosen Kaisha,

Ltd., and upon delivery to and receipt of said bales in good order and condition said Osaka Shosen Kaisha, Ltd., on behalf of itself separately and as a duly authorized agent of the defendant operating lines of railroad, as aforesaid, did jointly execute and deliver four certain through Trans-Pacific and Overland Bills of Lading covering the transportation of said 1000 bales of waste silk from Canton, China, to Providence, Rhode Island, and consigned and destined as aforesaid."

This finding is not objected to by plaintiff in error.

FINDING V

"That by the terms of said bills of lading said waste silk was to be carried by said Osaka Shosen Kaisha, Ltd., from Canton, China, to Seattle, or Tacoma, Washington, on its steamship "Canada Maru" and there deliver to the defendant to be carried by the defendant over the lines of the Chicago, Milwaukee & St. Paul Railway Company and other lines of railroad connecting therewith to the destination named in said bills of lading, to-wit, Providence, Rhode Island and there delivered to the order of said consignee."

This finding is not objected to by plaintiff in error.

FINDING VI

"That said goods were purchased by the plaintiff of the manufacturer in China on four months letter of credit from date of shipment, issued by the consignee banks, and on August 7, 1918, and prior to the arrival of the goods at Tacoma, the consignee banks without receiving immediate payment of the

purchase price, endorsed and delivered the bills of lading to the plaintiff and plaintiff subsequently paid the drafts which had been guaranteed by letters of credit issued by the consignee banks, when the same became due."

This finding is not objected to by plaintiff in error.

FINDING VII

"That said bills of lading were numbered, dated and covered the said 1000 bales of waste silk as follows:

B-L No. 8 dated June 21, 1918, 300 bales.
B-L No. 9 dated June 21, 1918, 200 bales.
B-L No. 10 dated June 24, 1918, 200 bales.
B-L No. 11 dated June 24, 1918, 300 bales.

That each of said bills of lading contained stipulations of the following tenor: 'Any carrier or party liable on account of loss of or damages to any part of said property shall have the right of subrogation for the full benefit of any insurance that may have been effected upon or on account of said property.'

'Except in the case of negligence in the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession) the carrier or party in possession shall not be liable for loss, damage or delay occuring while the property described herein is stopped and held in transit upon request of the shipper, owner or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes.' That at the time the bills of lading were issued freight from the through service was prepaid at the tariff rates as to the railroad service prescribed in the Tariff previously filed with

the Interstate Commerce Commissioner and then in effect."

This finding is not objected to by plaintiff in error.

FINDING VIII

"That on July 30, 1918, and during the time said 1000 bales of waste silk were in course of transportation on said S. S. 'Canada Maru' under the said bills of lading, said vessel stranded and large quantities of salt water entered her holds, and as a result 500 bales of said waste silk known as 'Canton Steam Waste Silk No. 1' and 367 bales of said waste silk known as 'Canton Steam Waste Silk No. 2' became wet from the contact with the salt water.

That upon arrivel of said S. S. 'Canada Maru' at Tacoma, Washington, the said 1000 bales of waste silk were discharged from said vessel. Such discharge was begun early in the morning of August 12, 1918."

Plaintiff in error objects to that portion of Finding VIII in italics (Assignment of Error XVIII) for the reason that there was no evidence introduced upon the trial indicating the number of bales of qualities No. 1 and No. 2 silk waste.

In the portion of the testimony of the witness, Edgar W. Lownes, heretofore quoted in support of Finding of Fact III, is found positive evidence that out of the 1000 bales in the shipment 867 bales arrived at destination in a damaged condition, and the balance (133) arrived at destination in a sound

condition, and that out of said 867 damaged bales, there were 500 bales of No. 1 and the remainder were of No. 2.

In the testimony of Frank G. Taylor on page 95 of the printed record we find the following question and answer:

Q. "There was 133 went forward untouched?"
A. "Yes."

FINDING IX

That the 133 bales of waste silk which had not been wet with salt water were in due course transported by defendant to destination. That the remaining 867 bales which had been wet with salt water were discharged on the dock, which dock belonged to the Chicago, Milwaukee & St. Paul Railway Company, and was then being maintained and operated by defendant as a part of said railway system.

That after the vessel had commenced discharging the wet silk, Mr. Taylor, the representative of the underwriters and owners thereof, called on Mr. Cheeney, the chief clerk of the freight agent at Tacoma, and who was in charge of the dock and the movement of freight therefrom, and told Mr. Cheeney that he was very anxious to have quick dispatch of the wet silk, and that it was important that it should go forward in its wet condition. Cheeney and Taylor looked at the silk as it was being discharged from the vessel and placed on the dock, and Taylor requested that it be forwarded

by silk train service in refrigerator-cars, and Cheeney agreed to so forward it, stating that the cost of such service would be $7.50 per hundred pounds as against the bill of lading freight of $1.75 per hundred, and that there would be an additional charge for refrigeration of aproximately $21.00 per car to pay, all of which Taylor agreed to. On August 14th, Taylor again called on Cheeney to see how the matter was progressing, and he and Cheeney again examined the silk, and Taylor was told by Cheeney that the cars had been ordered and would be brought in shortly, and thereafter the cars were brought in, and approximately one-half of the wet silk bales were loaded on two or more refrigerator-cars for shipment."

Plaintiff in error objects to that portinn of Finding IX in italics for the reason that no evidence was introduced upon the trial in support of same.

It should be noted that in the first portion of Finding IX the court finds that 133 of the bales which had not been damaged by salt water were in due course transported to destination, to which finding no exception is taken; and the court further finds that the remaining 867 bales, which had been wet with salt water were discharged on the dock, which dock belonged to the Chicago, Milwaukee & St. Paul Railway Company, and was then being maintained and operated by defendant as a part of said railway system. No exception is taken to this finding.

The evidence in support of that portion of Finding IX to which exception is taken is so full and complete and uncontradicted that it is very hard for us to understand how plaintiff in error can assert there is no evidence to support the same.

In a printed record the testimony of the witness Frank G. Taylor begins at page 78 and at the bottom of page 79 Taylor says:

"I went over to Tacoma on the 12th of August, on Monday. The ship, as I recollect, had begun to discharge that morning at eight o'clock, August 12th. I went in to see Mr. Cheeney of the Milwaukee Road. I told him that we were very anxious indeed to have a quick dispatch of this silk and that it was very important that it reach destination as quickly as possible."

On page 80, Taylor further says:

"I told him that it was most important that the silk arrive at destination wet. I asked Mr. Cheeney if it would be possible to forward the silk by silk train service, and he said that it would. I asked him if it could go in refrigerator-cars and he said that it could. We looked over the silk and looked over some of the other cargo that was coming out and then walked back to the office—to his office. When we got back to his office I asked Mr. Cheeney what it would cost to send that by silk train service, and he told me that it would be $7.50 per hundred, as against $1.75 for the bill of lading rate. "

(And on page 81):

"$1.75, as I understand it, had been prepaid; and I inquired regarding the cost of refrigeration,

and he told me that it would cost approximately $21.00 a car. * * * I went over to Tacoma on the 14th. I went over there that day to see just how things were getting along, and everything was all right, progressing. (Page 82). Mr. Cheeney told me that the cars had been ordered to be brought in shortly. I went down and I looked at the silk with Mr. Cheeney. * * * * * I went over on the 16th, figuring that I would find the cars loaded and ready to go out. Captain Wheeldon, from New York, was with me that day. (Page 83). I looked at the silk on that day. The condition was—the silk that was on the wharf was practically cool—some bales that showed evidences of heating, but nothing disturbing. The cars—as I remember there was three cars loaded. Three refrigerator-cars on the siding loaded that had just been wetted down. I went over and felt of the bales in the car and they were cool."

Q. "What, or approximately what proportion of the cargo of wet silk had been loaded into the refrigerator-cars?"

On cross examination Mr. Taylor further confirmed the loading of the bales in the refrigerator-cars as follows:

Q. "Did you see two or three cars loaded?"

A. "Well, they were being loaded."

Q. "After they were loaded?"

A. "I did. It was the 16th I was over there."

Q. "And when you were over there, were there two or three refrigerator-cars loaded or unloaded?"

A. "They were loaded." (Page 99).

After the cars had been loaded some question

arose over forwarding the silk and Mr. Taylor, who represented the owners and underwriters of the shipment, was referred to Mr. H. B. Earling, the Vice-President of the Railway in Seattle. Mr. Earling was out of town and Mr. Taylor was referred to Mr. Barkley, his assistant. (Page 83). Mr. Barkley said he woud take the matter up with Mr. Earling and advise Mr. Taylor. Continuing, Mr. Taylor says (page 84):

"That was on the 17th. On the 19th I called on Mr. Barkley again. He had heard nothing from Mr. Earling. On the 20th I called on Mr. Barkley—he had heard nothing then. On the 21st I called on Mr. Barkley, and he told me that the road had decided to forward this freight—to forward the waste; and on the 22nd, the day following I went over to Tacoma again and saw Mr. Cheeney and arranged for the forwarding of the silk in the manner that we had previously arranged."

Mr. Taylor testified (page 79) that in all these matters he was representing the Underwriters and the owners of the silk stating:

"I was requested by the Atlantic Mutual insurance Company, who are members of the Board of Underwriters of New York, to represent the underwriters and owners in that business."

On cross examination, Mr. Taylor further testified (page 91):

Q. "Mr. Cheney was at the docks, that was his office was it not?" A. "Yes." Q. "Now Mr. Che-

ney you found at one of the docks?" A. "At the Milwaukee No. 1 in the office." Q. "That is the dock on the waterfront?" A. "That is right." Q. "You first talked with Cheney?" A. "Yes." Q. "You told him you wanted to see the cargo as it came out of the ship?" A. "I did." Q. "It had not all come out at the time you were there on the 12th?" A. "No sir." Q. "A very small portion of it had come out?" A. "I would say that possibly 200 bales. I went to Mr. Cheney first and Mr. Cheney and I walked down and saw the cargo together." Q. "And you looked at what came out at that time, the two of you?" A. "We naturally looked at what came out of the boat." (Page 92). Q. "And then Mr. Cheney went back to his office, and where did you go?" A. "I went back with him." Q. "And then you talked about sending it forward?" A. "Yes." (Page 93).

In the printed record (page 335) is the testimoney of Fred J. Alleman, a witness for the defendant below, who testified that at the time in question he was the head of the freight department of the Milwaukee Railroad in Tacoma; that he maintained an uptown office at 25th and D Streets about three miles from the docks, and that his office proper was known as the uptown office. (Page 336). That included the freight sheds there where the trains brought in freight and took out freight, and that he had there an operating force of an Assistant Agent and a clerical force sufficient to carry on the work. He further testified (page 336):

Q. "Then you have charge of the docks?" A.

"Yes." Q. "How many docks, if there are more than one, and where are they located?" A. "There were three docks at that time that were in service, No. 1, No. 2, No. 3, and they were located on what is known as the Milwaukee Channel." Q. "That is on Commencement Bay?" A. "Yes." Q. "And those are the docks against which the ships from sea come and unload freight?" A. "Yes." Q. "And what force have you or did you have at that time operating those docks?" A. "I had a Chief Clerk at each dock in charge of the office work; sufficient clerical help to carry on that work, and also a general foreman and assistant general foreman and the necessary labor to carry on that work." Q. "You had a man there by the name of Cheney?" A. "Yes." Q. "What was his full name?" A. "Calvin R. Cheney." Q. "And what position did he hold at the docks?" A. "He held a position as Chief Clerk. (Page 337). Mr. Cheney's work consisted—he was in charge of the office and clerical end with clerks under him and had general supervision of the office." Q. "Now beyoond him, you had then what you call a dock foreman?" A. "Yes." Q. "And what were his duties?" A. "The duties of the dock foreman were to have charge of the discharging of steamers, the loading of steamers, the unloading of cars to and from the warehouse." Q. "Where is Mr. Cheney's office, and where did Mr. Cheney work on the dock with reference to where the ship involved in this lawsuit loaded?" A. "At the extreme north end to what is known as Dock No. 1."

From the forgoing positive and undisputed testimony, it must be very clear to this court that there was ample and complete evidence to sustain and support every part of finding of fact IX as made by the court, and that the objection of plain-

tiff in error to said finding for the reason that no evidence was introduced upon the trial to support the same is wholly without merit. The fact of the matter is that the finding in question is not in the form requested by either party to this action. The trial court having carefully examined the evidence, prepared this finding and expressed it in his own language. A careful comparison of the words of the finding with the testimony of the several witnesses in support of it will show that the finding is practically a reiteration of the exact words of the witnesses whose evidence support it. Furthermore, this testimony is uncontradicted.

FINDING X.

"That after thus contracting for and accepting all of said 867 bales of wet waste silk for transportation as aforesaid and after loading approximately one-half of said bales in refrigerator cars as aforesaid, the defendant without the consent of plaintiff and in disregard of plaintiff's protest, failed and refused to transport said bales of wet waste silk, or any part thereof to destination, and thereafter defendant caused the bales loaded in said refrigerator cars to be unloaded on said dock, all contrary to the terms and requirements of the aforesaid contract of carriage."

The plaintiff in error objects to all of this finding, stating that there is no evidence to support it. (Assignment of Error No. XX).

We have clearly pointed out to this court the

evidence supporting Finding IX relating to the agreement of the defendant, in consideration of the prepaid freight, and of further freight and charges to be paid by plaintiff, to transport the wet silk to destination by silk or passenger train service in refrigerator cars. There can be no doubt but that the defendant, in pursuance of the terms of said agreement, and in part performance thereof, actually ordered the refrigerator cars switched onto the dock and actually loaded over one-half of the bales into the refrigerator cars. That the silk was so loaded, is undisputed. Mr. Taylor (p. 83) testified that three refrigerator cars were loaded and contained, to the best of his recollection, something over one-half of the shipment. Mr. Alleman testified (P. 345) that he saw two cars loaded with the silk waste. Capt. Wheeldon (p. 189) testified that to the best of his recollection, there were two cars and a part of a third car loaded and that he and Mr. Taylor examined the loaded cars. Mr. Corey (p. 241) testified that he saw the silk loaded in the refrigerator cars.

There can be no doubt that after so loading the silk into the refrigerator cars, the defendant refused to transport it in accordance with the agreement. Such is the testimony of Mr. Taylor (p. 86). He says:

"On the 23rd, the following day, Mr. Barkley telephoned my office that the road had definitely decided not to forward."

And on page 87 he says he discussed with Mr. Barkley whether or not the railroad would forward the shipment in its then condition, and that Mr. Barkley told him distinctly they would not forward it, "that they refused to forward it." Mr. Taylor protested, as his evidence shows. Q. "Did you say anything to him with reference to the responsibility of the road for their refusal?" A. "I did." Q. "What did you say?" A. "I told him that, undoubtedly, this would result in a claim for damages against the road."

Again on Page 101 is found the evidence of Taylor to the effect that on the 16th Cheeney told Taylor that the railroad refused to allow the silk to go forward, notwithstanding over one-half of it had previously been loaded in the refrigerator cars.

There can be no doubt that the Railroad Company, after loading several cars of the silk for shipment, according to the agreement, and then refusing to transport the same, according to agreement, proceeded to unload the silk from the refrigerator cars.

Taylor testifies (p. 85) that on the 22nd he saw the silk and at that time the silk "had been

discharged from the refrigerator cars and was lying on the platforms between the two warehouses." And Mr. Alleman (p. 351) testified that the Railroad Company unloaded the cars on the 16th and piled the bales three high on the open platform.

It seems almost useless to take the time of this court to argue over the evidence in support of this finding, for it must be manifest that if the Railroad Company had forwarded the silk, according to agreement, the parties would not now be in litigation about it.

FINDING XI.

"That at the time said 867 wet bales were accepted for shipment as aforesaid and at all times thereafter, the same were properly packed and in condition for safe transportation by defendant from Tacoma to destination by silk or passenger train service in refrigerator cars, and such transportation was not prohibited by any regulation of the Interstate Commerce Commission."

Plaintiff in error objects to all of this finding for the reason there is no evidence to support it (Assignment of Error XXI).

Most of the evidence in the case relates to the condition of the 867 wet bales from the time the same were discharged from the steamer until the same were at a later period dried and eventually

forwarded to destination. Much of this evidence relates to the possibility of spontaneous combustion taking place in the silk in the event the same was loaded into cars at the time and promptly forwarded to destination. It is practically impossible to briefly review all this evidence. When the bales in question were discharged from the steamer they were saturated with salt water. When the bales were piled on the dock fermentation set in and the bales became warm and gave forth an unpleasant odor.

There is ample evidence to sustain the finding of the court that the bales were in condition for safe transportation from Tacoma to destination by silk or passenger train service in refrigerator cars.

Mr. Taylor testified (p. 81) that "it was warm, but there was nothing to worry about, and I never thought anything about it, and I never mentioned the question of it being warm." He and Mr. Cheeney examined the bales and he said, "Neither of us mentioned it. I suppose we had both seen a great deal of that kind of cargo and thought nothing of it."

And on page 82, Taylor further says that on August 14th "I went down and looked at the silk

with Mr. Cheeney and some of the bales, the heat had gone out of the bales entirely, others were still warm."

He further states (p. 83) that on the 16th "I looked at the silk on that day. The condition was —the silk that was on the wharf was practically cool—some bales showed evidences of heating, but nothing disturbing. The cars—as I remember there was three cars loaded—three refrigerator cars on the siding loaded that had just been wetted down. I went over and felt of the bales in the car and they were cool."

And he further testified (p. 85): "I saw the silk, yes, on the 22nd I saw the silk. The silk to the best of my recollection at that time had been discharged from the refrigerator cars and was lying on the platforms between the two warehouses. It was the same as it had always been; some of the bales were warm; others cool; some showed some evidences of heating, but there was nothing disturbing about it."

(P. 86): "I have had considerable experience with rice, with beans, with tea and I must say that I have seen anyone of those commodities much warmer than the silk was."

On cross-examination (p. 116), he says: "The

second day that I was over there, that was on the 14th, the bales were exposed to the sun and they were warm; some were warmer than others, but there was absolutely nothing, in my opinion, to be disturbed about. It never occurred to me that they could catch fire or that there was any danger from them."

On page 115 will be found the testimony of Mr. Taylor respecting his experience over a long period of years in handling cargoes damaged in marine disasters, and no doubt counsel will concede that Taylor has had much experience in this line and that his judgment and advice in matters of this kind is eagerly sought and followed.

The testimony of Edgar W. Lownes, President of the American Silk Spinning Company, is found on pages 118-140. It shows he has been in the business of handling silk for the past 31 years and that his factory uses as a raw commodity principally Canton Steam Waste. (P. 119.) He was asked the question:

Q. "Will you state, Mr. Lownes, from your experience in handling Canton steam waste whether or not in your opinion there is any danger whatsoever from spontaneous combustion when the silk is wet by salt water?" A. "No. There is absolutely no danger." Q. "Have you had any experience with silk waste which had become wet?" A. "Yes, a great deal of experience." (P. 122).

Q. "Have you had consignments of silk waste prior to the waste that is the subject of this suit coming from the Pacific Coast damaged by salt water?" A. "Yes." Q. "Has there been any evidence of combustion?" A. "No." Q. "Have you ever heard of silk waste, Canton steam silk waste, igniting by spontaneous combustion?" A. "Not of itself, no."

(P. 128):

Q. "Now, in order to move this cargo of waste silk, Mr. Lownes, from Tacoma to Providence at the time it was offered to us in the wet condition it would have to be kept wet and not allowed to dry?" A. "Not necessarily." Q. "You would have to keep it wet to the extent of keeping down fermentation, would you not?" A. "No." Q. "You could ship it in that condition, saturated completely and allow it to come along?" A. "If it came on a silk train, yes." Q. "We will say a silk train—that moves in how many days, six or seven days?" A. "Yes." Q. "You don't think it would ferment to any extent?" A. "Not enough to damage it."

(P. 134):

Q. "You spoke of a former experience that you had in the shipments—especially the shipments from the Pacific Coast through—that there was no evidence of combustion. What did you mean by 'combustion'? Did you mean a flame?" A. "No, nothing. No charring." Q. "Did you find any heating at all?" A. "Yes, but not over, I should say, 120 degrees." Q. "What was the extent of damage of that particular shipment?" A. "The damage was very small. We have had shipments come through with very few bales damaged out of a big shipment and practically no loss."

Theodore Bellinger, whose evidence appears on pp. 140-165, states that he is the General Agent

of the Champlain Silk Mills, and is factory manager of the Whitehall plant and attends to the purchase of raw material, and that the Company handles No. 1 and No. 2 Canton silk waste. He was asked (p. 141):

Q. "State whether or not in your opinion and from your experience Number 1 and Number 2 Canton steam silk waste which has been wet with salt water is liable to spontaneous combustion?" A. "I do not." Q. "Have you had shipments of Canton steam waste come to your factory damaged by salt water?" A. "Yes." Q. "Have you observed any tendency to spontaneous combustion?" A. "I did not." Q. "Have you ever heard of Canton steam waste igniting from spontaneous combustion?" A. "I never have."

Fred Pearson, a foreman silk-dresser, employed in that capacity since 1875, both in England and America, testified as follows (p. 170):

Q. "During this time, Mr. Pearson, have you handled silk waste, Canton steam silk waste?" A. "More or less, yes." Q. "Will you state, Mr. Pearson, whether Canton steam waste which has been wet with salt water or fresh water can ignite by spontaneous combustion?" A. "I should say no, it cannot."

Samuel H. Pearson, Superintendent in the factory of the American Silk Spinning Company, and having forty-two years experience in the silk business in England and America, testified (p. 176):

Q. "Have you during that time handled Can-

ton silk waste?" A. "Yes, both before I came here and ever since." Q. "You have handled it all during your experience in the silk business?" A. "Yes, sir." Q. "Have you had any experience with Canton steam waste which has been wet by salt water or fresh water?" A. "Yes."

Q. "Will you state whether or not in your opinion Canton steam waste which has been wet can ignite by spontaneous combustion?"

A. "Not to my knowledge."

Q. "Have you ever heard of it igniting from spontaneous combustion, because it has been wet?"

A. "No."

Arthur B. Little of Cambridge, Mass., a chemist and chemical engineer in general practice in Boston since 1886, and a chemist to very many mills employed in the manufacture of textiles and other fibrous raw materials, was examined as a witness for plaintiff below. His testimony appears in the printed record, pages 194 to 219. He testified as follows (page 195):

Q. "Have you investigated cases of spontaneous combustion and are you familiar with those phenomena?" A. "I have and am." Q. "Are you familiar, Dr. Little, with what is known as Canton steam silk waste, known as No. 1 and No. 2 grades?" A. "I am." Q. "Will you state whether or not in your opinion Canton steam silk waste of either of these grades, when wet with sea water is in any way liable to ignite with spontaneous combustion?" A. "In my opinion, it is not." (Page 196): Q. "Is it possible for sufficient heat to be developed by fermentation to cause any danger of spontaneous

combustion or ignition in the material?" A. "In my opinion it is not."

On page 198 the condition of the cargo in question at the time in question was described to Mr. Little and he was asked (page 199):

Q. "Will you state whether or not, in your opinion, there would have been any danger whatever of excessive heating or spontaneous combustion in that cargo?" A. "In my opinion there would have been neither."

On page 201,

Q. "Does it by any means follow, Dr. Little, that because animal or vegetable matter is heating, there is any danger of spontaneous combustion?" A. "It does not."

Again on page 202 the condition of the cargo at the time and place was described to him and he was asked,

Q. "Will you state whether or not, in your opinion there would be any reasonable grounds for assuming that the cargo was dangerous or in any way liable to spontaneous combustion?"

A. "In my opinion there were no reasonable grounds for such assumption."

On page 210 he says:

"I was, in fact, chemist to the Canadian Pacific Railway and made very extensive trips over its lines, and my estimate of the mental capacity and knowledge of their business possessed by railway freight agents and their familiarity with the gen-

eral characteristics of materials offered for freight would lead me to believe that an agent to whom a valuable shipment of common material were thus presented would be, and should be expected to possess the common knowledge of its relations to spontaneous combustion."

And on page 217 he further states:

"Canton Steam Silk Waste is a commodity of such well known character and frequent shipment and commercial value that those engaged in its transportation, and particularly the freight agents of transcontinental railways by which such material is commonly transported might, it seem to me, in my opinion, be properly assumed to possess the general knowledge of its properties and characteristics as regards any tendency to spontaneous combustion. In other words, they should know that it is commonly recognized that it has no such tendencies."

Edward A. Barrier, of Cambridge, Mass., a chemical engineer, graduated in 1905 from Massachusetts Institute of Technology, and the Assistant Chief Engineer of the Inspection Department, Associated Factory Mutual Fire Insurance Companies, was a witness for plaintiff below. His testimony is found in the printed record, pages 219 to 237, on page 222 it reads:

Q. "Are you familiar with Canton steam silk waste of the grades of No. 1 and No. 2?" A. "In a general way as related to its properties from a fire standpoint." Q. "Have you investigated and considered the properties of that commodity of

those two grades as to whether or not it is liable or possible to ignite spontaneously?" "I have." Q. "Is it possible for Canton steam silk waste of No. 1 and No. 2 grades which has been wet with either fresh or salt water to ignite spontaneously?" A. "In my opinion it is not."

On page 229 the condition of the cargo at the time and place in question was described to him and he was asked whether under such circumstances the cargo was a dangerous commodity to transport and liable to spontaneous combustion. He answered:

"I do not consider that the freight agent would be justified in taking that action. I might say that my reason for that is this; that I believe that a man whose duties it is to pass upon such important questions as that should be familiar at least with the general properties of the material with which he is dealing and the properties of raw silk with relation to spontaneous ignition such as is generally known among those who are qualified to give information on the subject are easily obtained. (Page 230).

Q. "Mr. Barrier, is it a matter of common knowledge among men who handle Canton steam silk waste as distinguished from chemical experts that it is not liable to spontaneous combustion?" A. "I should say it is." Q. "Is the fact that a commodity of animal or vegetable matter heats from fermentation alone reasonable ground for assuming that it is a dangerous commodity to transport or that it is liable to spontaneous combustion?" .A "I should say not. The railroads are regularly transporting material which is subject to heating which does not ignite spontaneously."

Russell Hook, a 1905 graduate of the Chem-

istry and Dyeing Department of the Lowell Textile School and chemist to many of the New England textile plants was a witness for plaintiff below, whose testimony appears in the printed record page 257 to 313. At page 290 it reads:

Q. "From all the tests and experiments that you have conducted, Mr. Hook, and from your general experience with textiles, will you give us your opinion as to the possibility of either No. 1 or No. 2 Canton steam silk waste under any circumstances igniting from spontaneous combustion?" A. "It is my opinion that there is no possible chance of silk waste similar to grades No. 1 and No. 2 that I have experimented with igniting spontaneously." (Page 291). Q. "Assume that the No. 1 and No. 2 Canton steam silk waste, thoroughly wet with sea water, in bales, were loaded in refrigerator cars, whether or not combustion could possibly be supported in the case emanating from the fermented silk." A. "I can not conceive of combustion existing or supported in the presence of the amount of ammonia that would be involved in the amount of fermenting silk."

(Page 292). The condition of the cargo at the time and place in question was then fully described to him and he was asked the question, (page 293):

Q. "Will you state whether or not, in your opinion, there would have been any reasonable ground to suppose that there would have been danger of spontaneous combustion in the silk?" A. "My answer is that there would be no reason to believe, under the conditions you have described, that there would be spontaneous combustion of the silk."

On page 299 the condition of the cargo at the

time and place in question was fully described to Mr. Hook and he was asked the question:

Q. "Would a person occupying the position of a claim agent of the railroad, assumed to have experience in handling cargoes generally, have been reasonably justified in assuming the cargo was dangerous and liable to spontaneous combustion?" A. "My answer would be that they would not be justified in refusing shipment of a cargo under conditions as stated."

Harry Mereness, operating chemist of the National Spun Silk Company of New Bedford, and in control of the raw products of twelve textile mills, was a witness for plaintiff below. His testimony appears in the printed record, page 314 to 333. He was asked the question, (page 313):

Q. "In your capacity as operating chemist of the National Spun Silk Company, have you had experience, and have you handled Canton steam silk waste of the grades of No. 1 and No. 2?" A. (Page 316). "My principal—you might say my principal job is the handling of steam wastes and other varieties of raw wastes in the preliminary processing stages, that is what we call boiling off—and that is my principal job." Q. "Will you state from your experience in those tests and from your experience with wet Canton steam silk waste in the mill, whether or not in your opinion there is any possible danger of spontaneous combustion which has been wet in salt water?" A. "In a general way, I would say I can not conceive in an ordinary condition either letting material dry naturally in ordinary room temperatures or heating at temperatures below 280° Fahrenheit of any chance of spontaneous combustion."

The condition of the cargo at the time and place of question was then fully described to him and he was asked to state whether or not, in his opinion, there would have been any danger of spontaneous combustion in the silk, to which he answered, (page 318):

"Under the conditions stated, I do not believe there would have been any chance for spontaneous combustion to have taken place."

George Corey, a marine surveyor, was a witness for plaintiff below. His testimony is found in the printed record, page 237 to 256, and is in part as follows. (Page 241):

Q. "And did you see the silk in the refrigerator cars?" A. "Yes sir." Q. "What was its condition, did you examine it?" A. "The condition when I saw it was in the same condition as it lay on the dock—warm." Q. "Was it heating to any alarming degree?" A. "No sir." Q. "Was there any danger in your estimation of spontaneous combustion?" A. "No sir, none whatever." (Page 242). Q. "From your experience in handling damaged cargoes, Mr. Corey, will you tell the court whether or not, in your opinion, the damaged silk waste of the American Silk Spinning Company was in any way dangerous to transport across the continent in those cars?" A. "Your Honor, if it had been

my silk I would have sent it forward immediately, as a matter of fact I ordered the stuff in the cars and recommended it to go forward." Q. "Did you hear anything more about the railroad refusing to forward it?" A. "Yes." Q. "Will you state what happened?" A. "I was standing in the vicinity of the silk and this gentleman was standing about the same distance from me that you are standing from me, and he walked up to me and said 'That silk can not go,' and I says 'Why?' 'Well,' he said, 'it might burn up the cars—it might burn up the depot—it might burn up the railroad property' and I says 'Mister,' I said, 'The Germans might come over here and shoot us all up, but they are not going to do it, and neither will that silk burn up the cars, and I am very much surprised to have you hold that silk here.'" (Page 244). Q. "Did it at any time show any signs of undue heating so as to cause alarm from spontaneous combustion?" A. "No sir, not in my mind, none whatever."

Respecting the manner in which the bales were packed, Mr. Bellinger at page 165 of the printed record said:

"There are three distinct parcels which are tied together in what they call the go-downs in Canton, and those three parcels are combined and tied up with a piece of rattan and covered over with straw matting, and those bales are put up

in uniform weight in what we call picol bales of 133 pounds."

The foregoing brief notations from the evidence of the several witnesses named are, we believe, sufficient to convince this court that there was ample, full and complete evidence in the case before the trial court to support finding of fact XI as made by the trial court. The silk waste was packed in bales in the usual and customary manner. The bales had not been broken at the time that same were discharged from the steamer and were not broken thereafter until it became necessary to break them open to dry the silk as a result of the railroad company having refused to transport it according to its agreement.

FINDING XII

"That thereafter defendant demanded that said bales be dried and reconditional before defendant would transport the same to destination, and plaintiff in order to secure transportation of said bales to destination was required to and did cause the same to be dried.

That the reasonable cost and expense of drying said bales was $5000.00, which sum plaintiff paid therefor.

That plaintiff in taking possession of said 867 bales of wet waste silk for the purpose of drying it as

aforesaid did so without relinquishing any of plaintiff's rights in the premises.

That after said 867 bales had been dried as aforesaid, the defendant transported the same without additional freight or charge to destination, to wit: Providence, Rhode Island, and there delivered the same to plaintiff.

Plaintiff in error excepts to that portion of this finding in italics upon the ground that there was no evidence introduced upon the trial to support the same. (Assignments of Error Nos. XXII and XXIII).

It will be noted that plaintiff in error takes no exception to that portion of this finding to the effect that defendant below demanded that the bales be dried and reconditioned before they would transport the same, and that in order to secure transportation of the bales the plaintiff below was required to and did cause the bales to be dried.

In support of that portion of this finding to which exception is taken, we direct the attention of the court to the evidence of the witness Taylor as set forth in the printed record as follows (p. 89) where he was questioned as to what he did after the railroad refused to transport the silk.

A. "Well, there was nothing left for me to do then but to try to dry it, and I made arrangements with the same man; with this Mr. Meyers, to dry the waste."

(Page 90):

Q. "How long did it take to dry the silk?" A. "It took from September 7th until January 30th of the next year." Q. "Under what arrangements with Mr. Meyers was the silk dried?" A. "He agreed to dry it for five thousand dollars." Q. "Did you pay Mr. Meyers that sum for drying it out?" A. "I did."

(Page 107):

Q. "And then you say you contracted with Mr. Meyers to dry this for five thousand dollars?" A. "That is right." Q. "Will you itemize that account—as to why it cost five thousand dollars to dry that stuff?" A. "Well, I do not know why it cost five thousand dollars, but I submitted the offer to dry it for five thousand dollars to my people, and they agreed to it." Q. "Did Mr. Meyers submit to you the things he would have to do in order to dry it?" A. "Yes." Q. "Can you give me some of the items of the cost of the five thousand dollars that he submitted to you?" A. "I imagine the principal item was the labor." Q. "Why would it cost so much?" A. "Because it was a poor time of the year to try to dry anything, and it would take a long time to dry that stuff in the open."

(Page 109):

Q. "Who told you to dry it out—the men from the East?" A. "I got authority to dry it out." Q. "From whom?" A. "From the people I represented." Q. "They thought that was the best thing to do?" A. "That was the only thing we could do at that time, on account of your refusing to carry it forward." Q. "And you were told to dry it by the people in the east?" A. "I was authorized to dry it after it was reported to them that was all I could do."

(Page 110):

Q. "And you cannot give me any of the items that go to make up this five thousand dollars for drying?" A. "Well, there was considerable lumber. There was a setting up of the racks. There was the breaking up of those bales of silk and hanging it on those racks."

On cross examination, Mr. Taylor testified as follows, (p. 105):

Q. "Then when it was finally refused by Tacoma you said the only thing you could do was to take the cargo back?" A. "No, I did not say that." Q. "Well, you took the cargo then from the possession of the railroad?" A. "I never did."

The testimony of Mr. Taylor respecting the manner in which the silk was dried, the necessity for drying it, and time and expense incurred in drying it, and the reasonableness of the cost is fully supported and confirmed by the testimony of Mr. Meyer found in the printed record at pages 426-434.

FINDING XIII

"That the drying of said 867 bales of wet waste silk was done in a reasonable and proper manner.

That the natural and approximate result of the drying of said bales of waste silk was a weakening of the fiber and a discororation of said waste silk. That upon arrival of said 867 bales of waste silk at destination, the reasonable, fair market value thereof was the sum of $14,815.67, and no more."

Plaintiff in error objected to that portion of

this finding in italics upon the ground that there was no evidence introduced upon the trial to support the same. (Assignments of Error Nos. XXIV and XXV).

Respecting the effect of the drying out process upon the silk bales, the court's attention is directed to the testimony of the witness Lownes in the printed record at page 139. He was the president of the plaintiff, American Silk Spinning Company. He states that after the bales had been dried and later arrived at the plant of his company in Providence, Rhode Island, he examined the bales and found that they were unfit for use because of the deterioration in the bales which had resulted from the drying out process.

Q. "Could you give any idea how much the fiber had been weakened?" A. "No, I couldn't give it in terms of figures?" Q. "Well, had it been materially weakened?" A. "Yes. So much so that it wasn't commercially practical to use it—that is, for spun silk. It could be used for something else, for making what is called a noil silk where they break the fiber up and spin it on a wool machine." Q. "Couldn't you work it in with your other silk, Mr. Lownes?" A. "Not without spoiling the other silk." Q. "In what way would it spoil the other silk?" A. "Our silk that we get is a very nice long silk, white and of uniform fibre. The minute you put a short fiber in with a good silk you would cause what we call slugs, or bad places in the yarn and the short fiber would show." Q. "What would it be worth for use in the noil silk?" A. "Worth

very little, perhaps four or five cents a pound. No, it couldn't be used in regular business."

Mr. Bellinger, a witness for the plaintiff below, the factory manager of the Whitehall plant of the Champlain Silk Mills, possessed long experience and much knowledge in matters pertaining to Canton steam silk waste. In his testimony at page 162 of the printed record, he was asked the question:

Q. "You spoke about drying out and remaining in a dried out condition, causing a weakness of fiber; will you explain that?" A. "Yes, we find that waste silk which is wet and allowed to dry in the natural process of drying will be more discolored and much more difficult to process afterwards than a waste which is treated after being wet and not having been allowed to dry out." Q. "As I understood, you testified on cross-examination that you saw samples of this particular cargo of silk waste?" A. "Yes, we had some samples sent to Whitehall, and I saw the waste. Afterwards I was present at the auction you held in New York, and saw the goods in the warehouse." Q. "And you know the condition?" A. "Yes." Q. "Will you describe the condition of the silk waste you saw?" A. "The samples on exhibition there in the basement of the building were still, some of them quite damp. The stock was very dark in color, and in our estimation had been very much weakened."

Respecting the portion of the finding relating to the fair market value of the 867 bales on arrival at destination, it seems to us the evidence in support of this finding is ample, positive and uncontradicted.

When the bales finally arrived at the plant of the American Silk Spinning Company at Providence, Rhode Island, it was found that the drying out process had caused such weakening of the fiber and discoloration of the silk as to make the same practically worthless for manufacturing purposes. After some negotiation, it was determined that it should be sold on the open market for the best price obtainable.

Charles E. Burling, of the firm of Burling & Dole, 599-601 Broadway, New York City, Auctioneers, was a witness for plaintiff below. His testimony is found in the printed record at pp. 165-169. He testified that his firm sold the 867 bales at auction in New York City during the month of March, 1919. It is conceded that the bales so sold were the identical bales of silk waste involved in this suit (p. 166).

His testimony reads:

Q. "Did you advertise the sale of the raw silk?" A. "The auction sale of the raw silk which was to take place on Wednesday, March 19th, 11 o'clock at 599 Broadway was advertised in the following papers: "Journal of Commerce," 17th, 18th and 19th of March; "Daily News Record," the same dates and "New York World," March 19th. We caused to be printed a circular descriptive of the seven carloads which we sent to the trades interested within a radius of 250 miles. 500 of these circulars were sent out. We had numerous prospective buyers call, but not many required the per-

mit to examine the car lots after viewing the one car which had been subdivided into three lots. The sale took place as advertised and the ten lots were purchased by four different buyers. There were possibly 25 to 35 people in attendance when the sale was held. The buyers were silk merchants, either jobbers or manufacturers. The gross proceeds of the sale amounted to $16,628.42, less charges as follows: Commission, $831.42; cataloguing, advertising, circulars, postage and insurance—insurance for what we had in our store—$124.71; labor and weighing—for the lot that was in the store we had a weigher come—$91.55; freight and cartage paid $681.93; port warden's fee, being held for a decision as to the legality of the charge, $83.14—making a total charge of $1812.75—net proceeds of the sale $14,815.67."

FINDING XIV

That had defendant carried out its contract with plaintiff and transported said 867 bales of wet waste silk to destination by silk or passenger train service in refrigerator-cars, the fair market value of 500 bales of No. 1 waste silk upon delivery at destination would have been $95,394.25, less 10%, and the fair market value of the 367 bales of No. 2 waste silk upon delivery at destination would have been $40,342.27, less 10%, and the total net value of said 867 bales upon delivery at destination would have been $122,163.32."

Plaintiff in error excepted to all of this finding for the reason that there was no evidence introduced upon the trial to support the same (Assignment of Error XXVI).

The witness, Lownes, testified as follows (p. 120):

Q. "Out of this shipment of a thousand bales how many bales arrived in a damaged condition?" A. "867." Q. "Out of the 867 bales damaged how many bales were there of the number one Canton steam waste?" A. "500 bales number one." Q. "And how many of number two?" A. "367 number two."

On page 126 he was asked what was the value of No. 1 and No. 2 Canton silk waste in New York in August, 1918, to which he replied:

"The number one was five shillings eight pence per pound, and the other, number two, was three shillings two pence." Q. "Have you that in dollars and cents?" A. "$1.51 for the number one and 87 cents for the number two."

and he further testified that there were 46,613 pounds of No. 2. He was then asked what would have been the market value of the 867 bales of silk in New York in August, 1918, had the same been promptly forwarded from Tacoma to New York in their wet condition, and pursuant to the agreement of the Railroad Company to so forward the same in refrigerator-cars by silk or passenger train service, to which he replied in substance that the value of the silk would have been 10% less than its value in New York at the time in a sound, undamaged condition.

The witness Burling, who later sold the silk in New York at auction, was asked the weight of

the silk, to which he replied (p. 166) 112,000 pounds —to be accurate, 112,101, and Mr. Korte, attorney for the Railroad, conceded that the silk waste which was handled by Mr. Burling was the identical silk waste involved in this suit.

The witness, Bellinger, testified (p. 165) that the weight of the bales was 133 pounds each and that they make an allowance of 5% on the original weight, due to the loss of weight in transit, on account of the moisture drying out in the transportation between Canton and America.

Mr. Lownes endeavored to state in exact dollars and cents the value of the silk in question at New York, but it is very manifest that the total amounts, as given by him are incorrect, and that, through inadvertence, he computed the value of the bales of No. 1 silk at 87 cents per pound, which he testified was the value of the No. 2 silk, and that through like inadvertence, he computed the value of the bales of No. 2 silk at $1.51 per pound, which was the value of No. 1 silk. It is rather unfortunate that this error in computation of values was made, but it is not of any great importance for the reason that knowing the weights of each grade, and the value of each grade per pound, the total value can be computed with little difficulty.

Taking the total weight, 112,101 pounds, as

testified to by witness Burling, and deducting therefrom the weight of the No. 2 grade, 46,613, as testified to by witness Lownes, we have 65,488 pounds as the weight of No. 1 grade. 65,488 pounds No. 1 grade at $1.51 per pound gives $98,886.88 as the value of the No. 1 grade; 46,613 pounds of No. 2 grade at 87 cents per pound gives $40,553.31 as the value of No. 2 grade. The sum of these two items is $139,440.19. Deducting from said sum 10% thereof, gives $125,496.18. It will be noted these figures practically correspond with the values of $95,394.25 for the No. 1 grade, and $40,342.27 for the No. 2 grade, and the total of $122,163.32 for both grades as found by the trial court, and were there no other evidence, the evidence above given is wholly sufficient to support the finding. However, we believe the trial court made its own computations based upon the above evidence as follows:

NO. 1 SILK WASTE

500 Bales of 133 lbs. each	66,500 lbs.
Deduct 5% for normal shrinkage	3,325 lbs.
	63,175 lbs.
value at $1.51 per lb.	$95,394.25

NO. 2 SILK WASTE

367 Bales of 133 lbs. each	48,811 lbs.
Deduct 5% for normal shrinkage	2,449 lbs.
	46,371 lbs.

Value at $.87 per lb.	$40,342.77
TOTAL SOUND VALUE	$135,737.02
Deduct 10% for loss in value had bales been promptly shipped to New York wet	13,573.70
	$122,163.32

The above figures are the exact figures as found by the trial court and the evidence above noted fully supports the same.

FINDING XV

"That in addition to the bill of lading freight the contract between the defendant and plaintiff relating to the transportation of said 867 bales of wet waste silk from Tacoma, Washington, to destination by silk or passenger train service in refrigerator-cars required the plaintiff to pay further freight and charges amounting to $6,724.75."

Plaintiff in error excepts to all of this finding for the reason that no evidence was introduced upon the trial to support the same (Assignment of Error XXVII).

There is, in our opinion, ample evidence to sustain this finding. The witness Taylor on page 81 of the printed record testifies as follows:

"When we got back to his office I asked Mr. Cheeney what it would cost to send that by silk train service, and he told me that it would be $7.50 per hundred, as against $1.75 for the bill of lading rate. $1.75, as I understand it, had been prepaid; and I inquired regarding the cost of refrigeration

and he told me that it would cost, approximately $21.00 a car."

and on page 95 he testified further:

"I think, to the best of my recollection, I think we figured on five cars."

On this basis, the freight, in addition to the prepaid freight of $1.75 per hundred, would be $5.75 per hundred, plus the cost of refrigeration of $21.00 a car. The weight of 867 bales at 133 lbs. per bale was 115,311 lbs, the additional freight on which, at the rate of $5.75 per hundred pounds, would be $6,619.75, to which should be added the cost of refrigeration of $105.00, making a total of $6,724.75 of additional freight and charges.

FINDING XVI

"That as a result of the failure and refusal of the defendant to perform its contract to transport said 867 bales of wet waste silk from Tacoma, Washington, to destination by silk or passenger train service in refrigerator-cars, the plaintiff has been damaged in the sum of $105,622.90."

To this finding plaintiff in error excepted on the ground that there was no evidence introduced upon the trial to prove the same (Assignment of Error XXVIII).

The evidence referred to in support of the 12th, 13th, 14th and 15th Findings fully and completely supports the facts in this finding, and the matter

resolves itself purely into a question of computation.

In Finding XIV the court found that had the wet silk been transported in accordance with the contract, its value upon delivery at destination would have been $122,163.32. From this sum should be deducted the proceeds of the auction sale, $14,815.67, and the additional freight for silk train service and refrigeration charges, $6,724.75, which leaves $100,622.90, to which last named sum should be added the cost of drying the silk at Seattle, $5,000.00, giving the final result of $105,622.90.

It is very easy to see how the trial court arrived at the figures set forth in this finding, and it is clear, beyond dispute, that the evidence supports the figures.

FINDING XVII

"That all of said 1000 bales of waste silk were insured against damage in transit from Hong Kong to Providence, Rhode Island, by an open policy issued by the Atlantic Mutual Insurance Company, and on February 6, March 7, and March 12, 1919, *the plaintiff received from the insurance company $102,052.96 in the aggregate "as a loan pending collection of loss on 867 bales of silk waste ex steamer "Canada Maru" refund of the loan to be made*

to said Atlantic Mutual Insurance Company out of the proceeds of the collection specified."

With respect to shipments such as involved in this action the insurance policy contained a clause as follows: "It is by the assured expressly stipulated in respect to land carriers that no assignment shall be made to such carriers of claim for loss or contribution of any kind under this policy, nor shall the right of subrogation be abrogated or impaired by or through any agreement intended to relieve such carriers from duties or obligations imposed or recognized by the common law or otherwise. (31)."

Plaintiff in error excepts to that portion of this finding in italics upon the ground that there was no evidence introduced upon the trial to support the same (Assignment of Error No. XXX).

In the printed record, page 661 and 662, are found three receipts which were introduced in evidence as defendant's Exhibit No. 29. These receipts are in identical form except as to dates and amounts. The first receipt is as follows:

"$50,000.00 February 6, 1919.

RECEIVED from Atlantic Mutual Insurance Company Fifty Thousand and 00/100 Dollars as a loan pending collection of proceeds of loss on 867 bales silk waste ex. Str. "Canada Maru," refund of the loan to be made to said Atlantic Mutual In-

surance Co. out of the proceeds of the collection specified.

(Signed) American Silk Spinning Co.
Edgar A. Lounge, ,res."

The next receipt is dated March 7, 1919 and covers a similar loan of $25,000.00, and the third receipt is dated March 12, 1919 and covers a similar loan of $27,052.96. The total of the three loans, as set forth in the three receipts, is $102,052.96.

The three loan receipts speak for themselves and amply, fully and conclusively support the portion of the findings of fact as made by the court to which plaintiff in error takes exception. The receipts were introduced in evidence by the plaintiff in error (defendant below). So far as we are advised, there is no other evidence in the record pertaining to these loans.

As heretofore stated, we do not believe the findings of fact as actually made by the trial court are open to review in this court. In any event, this court will go no further than to inquire as to whether there was *any evidence* to support the findings of fact to which exception has been taken, and if this court finds that there was *any evidence* to support the findings, then the findings must stand.

We believe we have clearly pointed out to this court that there is evidence in the record to sustain each and every finding of the court below.

GROUP V

Into this group fall Assignments of Error Nos. XXX to XXXIV, inclusive, which assignments are set forth on pages 31 and 32 of brief of account in error, and are to the effect that the trial court erred in making the conclusions of law which it did make, and in rendering final judgment in favor of the plaintiff against the defendant. The conclusions of law, as made by the trial court, are as follows: (Page 34).

1. That plaintiff is the real party in interest and entitled to maintain this suit.

2. That the contract between Cheeney and Taylor for the movement of the goods from Tacoma by silk train in refrigerator-cars was valid and binding on the defendant and no good and sufficient reason is shown for defendant's refusal to comply therewith.

3. That plaintiff is entitled to have and recover from defendant damages in the sum of $105,622.90 with costs and disbursements properly taxed

in this action, and that a judgment in favor of the plaintiff and against the defendant shall be entered accordingly.

As previously noted in this brief, the above conclusions of law, as made by the trial court, are in effect the direct opposite of the conclusions of law which the plaintiff in error (defendant below) requested the trial court to make, which requests the trial court refused, and to which refusal the plaintiff in error took exception and in this court assigns as error the refusal of the trial court to make said requested instructions (assignments of error XIV, XV, and XVI. Brief of plaintiff in error page 24).

The conclusions which the plaintiff in error (defendant below), as noted above, requested the trial court to make are as follows:

(1) The plaintiff herein is not the real party in interest, nor entitled in law to maintain this action.

(2) The defendant is not by any act or omission guilty of any breach whatever of the contract sued on herein.

(3) The defendant is entitled to have a judgment in its favor that the plaintiff take nothing by its action herein.

The conclusions of law which the trial court did make and the judgment which it entered therein, and the conclusions of law which the plaintiff in error requested the trial court to make, and which request the trial court denied, present, in our opinion, the real questions in this case, which can be reviewd by this court, and we will now proceed to the argument of these questions.

The trial court made three conclusions of law, each one of which presents a legal question, and we will argue the questions in the order of the conclusions.

1. THE PLAINTIFF IS THE REAL PARTY IN INTEREST AND ENTITLED TO MAINTAIN THIS SUIT.

The Code of the State of Washington provides (*R. & B. 1915 Code, Sec. 179*):

"Every action shall be prosecuted in the real name of the party in interest except as is otherwise provided by law."

By Section 180 of the same Code, it is provided:

"* * * * a trustee of an express trust * * * * may sue without joining the person for whose benefit the suit is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another."

By Sec. 189 of the same Code it is provided:

"All persons interested in the cause of action or necessary to the complete determination of the question involved shall, unless otherwise provided in law, be joined as plaintiffs when their interest is common with the party making the complaint, and as defendants when their interest is adverse."

By Sec. 196 of the same Code it is provided:

"The court may determine any controversy between parties before it when it can be done without prejudice to others or by saving their rights; but when a complete determination can not be had without the presence of other parties, the court shall cause them to be brought in."

The trial court found that plaintiff caused the waste silk to be shipped from China, consigned to the order of certain New York bankers, destined to plaintiff at Providence, Rhode Island; that said goods were purchased by the plaintiff of the manufacturer in China on four months' letter of credit from date of shipment issued by the consignee banks, and on August 7, 1918, and prior to the arrival of the goods at Tacoma, the consignee banks, without receiving immediate payment of the purchase price, endorsed and delivered the bills of lading to the plaintiff, and plaintiff subsequently paid the drafts which had been guaranteed by the letters of credit issued by the consignee banks when the same came due. (Finding of Fact VI, printed

record page 38). No exception was taken to this finding of the trial court, hence the same stands as the established facts in the case.

The New York bankers were not engaged in the silk, business, nor were they buying silk on speculation. While the bills of lading named the New York banks as consignees, still, by the bills of lading it was recited that the goods were destined to plaintiff, American Silk Spinning Company, at Providence, R. I. All parties to the transaction knew that the banks would endorse the bills of lading over to plaintiff as soon as the bills of lading arrived in New York. This was necessary in order that plaintiff might get delivery of the goods from the carrier. It is the carrier's duty to deliver the goods only upon the surrender of the bills of lading when the bills of lading are what is known as "order bills." There were no drafts attached to the bills of lading for the reason that acceptance and payment of the drafts had been previously guaranteed by the letters of credit. There was no reason why plaintiff should pay the drafts at the time the bills of lading were endorsed and delivered to plaintiff for the reason that the drafts were not then due. Plaintiff did, however, pay the drafts in full when the same became due. It was not contemplated by any of the

parties that the drafts should be paid before the waste silk was delivered at destination.

It hardly seems necessary to cite cases in support of the well recognized principle of law that an endorsement and delivery of an order bill of lading by the consignee therein, passes the title and right to possession of the goods to the transferee. The matter is discussed in the case of *First National Bank vs. N. P. R. Co.*, 28 Wash. 439, wherein the court states:

"Primarily a bill of lading or receipt is not necessary to constitute the contract. The delivery of commodities to the common carrier, with the designation of the person and place of shipment is all that is requisite. Custom and law fix the responsibility and liability of the carrier. The presumption then is that the consignee is the owner, and without notice to the contrary, the carrier may safely make delivery to him. It seems from an examination of a large number of cases involving the nature of bills of lading made by a common carrier, that the custom very generally exists of shippers selling or assigning such bills of lading and receiving payment therefor, and advances upon the same. This custom enables the shipper to receive immediate payment from his local bank. The usage materially aids and stimulates trade and commercial transactions. It enables the small shipper or producer to realize upon agricultural products, such as wheat, at the most favorable market prices."

The court then quotes at length from the case of *Ratzer vs. Burlington Ry. Co.*, 66 N. W. 988, and cites a large number of other cases holding that an

endorsement and delivery by the consignee therein named, of an order bill of lading, transfers the title and right of possession to the goods to the transferee. In the *Ratzer* case above mentioned the court says:

"A well-established custom has grown up in commercial circles by which such bills of lading are treated as the symbols of title to the property in transit, are taken as security for money advanced, and indorsed and delivered as a transfer of the property. This is well understood by the railroad companies and every one else. To allow the railroad companies to ignore this custom would be to destroy the custom itself. This would cause great hardship, revolutionize business methods, and drive all buyers and shippers of small means out of the business, as they could no longer give ready and available security on commodities in transit and thereby turn their limited capital sufficiently quickly and often to enable them to do much business. This, in turn, would destroy competition, and leave the business in the hands of a few concerns with unlimited capital. Neither have the railroad companies any right to ignore this custom. On the contrary, it must be held that these companies have been doing business with reference to this custom as much as the shippers themselves and the consignees, banks, commission merchants, and others, who are continually advancing money on the faith of the security of these bills of lading."

During the time goods are in transit under a bill of lading, the only evidence of ownership that the owner has is the bill of lading. So-called "order bills" are issued by the carrier for the express pur-

pose of enabling the consignee therein to endorse them to such persons as the consignee may order The order bills of lading are negotiable, and negotiation of them is contemplated by their very nature. We are at a loss to understand how it can be contended that one who is the holder of an order bill of lading duly endorsed to him by the consignee therein named, has not a sufficient interest in the goods covered by the bill of lading to maintain a suit arising out of the transportation of the goods subsequent to the time he became such holder.

In support of the contention that American Silk Spinning Company cannot maintain this suit, the plaintiff in error has in its brief cited the case of

Broderick vs. Puget Sound Light & Power Company, 86 Washington, 399.

In that case plaintiff's automobile had been damaged. The casualty company which had insured it ordered certain repairs made to the car but failed to pay the repair bill. The owner of the car, after receiving the machine fully repaired, brought suit against the third party who caused the damage to the car. The court held that the plaintiff, having been fully compensated by the full repair of the machine, and not being liable for the

bill of such repairs since she had not herself contracted the bill, could not maintain an action in her own right. The court said:

"The question presented is finally reduced to whether a judgment obtained by the appellant in this action would operate as a complete defense to an action prosecuted by another person. The appellant not being the trustee of an express trust, if she should recover a judgment, would hold the amount recovered under a trust arising by implication of law. In such a case, the rule supported by the authorities seems to be that if she should recover a judgment, and fail to account therefor to the person entitled thereto, her judgment would not operate as a bar to the right of any other person who had become subrogated to maintain a subsequent action."

It is clear that this case is not in point, but, assuming for the sake of argument, that the case is in point, we respectfully direct the attention of the court to the case of *Alaska Steamship Company vs. Sperry Flour Company*, 94 Wash. 227, 162 Pac. 26, in which it was held that it is no defense to an action against a wrongdoer that the plaintiff was insured against the loss by an employers' liability policy and had recovered the amount of the loss from the insurance company; hence the plaintiff might maintain the action as the real party in interest within the meaning of Rem. Code, Sec. 179.

From the facts in the case it appears that one

Egan, a longshoreman in the employ of the Steamship Company, was injured while loading one of its steamers at the dock of the Flour Company. Egan brought suit against both the Steamship Company and the Flour Company and judgment of dismissal was entered as to the Flour Company, but judgment was entered against the Steamship Company in favor of Egan for approximately $5,000 damages. Later the Steamship Company began a separate action against the Flour Company to recover the amount of the judgment it had paid in the former case, alleging Egan's injury was due to the sole negligence of the Flour Company. By way of defense the Flour Company alleged that the Steamship Company carried liability insurance and that after the Steamship Company paid the judgment in the *Egan* suit, the Liability Company paid the Steamship Company the full amount thereof, together with costs. The court said:

"The sole question raised by this appeal is whether, under this state of facts, appellant (the Steamship Company) is the real party in interest within the meaning of Rem. Code Sec. 179, and therefore entitled to prosecute this action as plaintiff, it being respondent's contention that, as soon as the judgment entered against appellant was paid by the insurance company, appellant was rendered whole and the insurance company was subrogated to all appellant's rights and became the real party in interest and therefore the only one entitled to prosecute this action. * * * Despite respondent's

contention that this is no longer an open question in this state by reason of the rule announced in *Broderick v. Puget Sound Traction, Light & Power Co.*, 86 Wash. 399, 150 Pac. 616, we approach the investigation thereof for the first time and untrammelled by former decisions. In the *Broderick* case *supra*, the plaintiff was not the insured and there never was any insurance paid by the insurer. It is obvious that there could be no question of whether the insured, upon payment of the loss could be subrogated to the rights of the insured; and while there might be some language in that decision which, if construed alone, might tend to support respondent's assertion, yet, when considered in connection with the facts, which must always be the case, this language does not support respondent's position."

The court then cites the case of *Illinois Cen. R. Co. v. Hicklin*, 115 S. W. 752, 23 L. R. A. (N. S.) 870, as follows:

"The law is well settled that a wrongdoer has no right to the benefits of the insurance, and cannot rely, either in full or *pro tanto* on the defense that the owner of the property has been previously paid by the insurance company. Payment to the owner by an insurance company of the amount of his loss does not bar the right against another originally liable for the loss."

The court also cites the case of *The Propeller Monticello*, 17 How. 152, to the same effect.

The court also quotes at length from the opinion of Judge Cooley in the case of *Perrott v. Shearer*, 17 Mich. 48, which case seems to be a lead-

ing case on this subject. The court in the opinion further states:

"There is a fatal fallacy in the reasoning which concludes that the insured is made whole upon payment of the loss to him by the insurer, in that the premiums are not refunded to the insured so paid by him to the insurer for the policy of insurance. * * * "

It also appears in the decision that the Steamship Company was insured in a Mutual Insurance Company and that the Steamship Company therefore had an actual interest because any recovery made by the Insurance Company would inure in part to the benefit of the policyholders of the Mutual Insurance Company. With respect to this feature of the case, the court said:

"Especially do we think this rule should be applied to the facts in this case because it appears that appellant has an actual interest, by reason of the nature of the insurance; for any recovery herein against respondent will be paid to appellant and other members of the club *pro rata* in the proportion that the tonnage of its boats and the contributions entered by it bear to the whole. The appellant was in a measure the insurer of its own liability."

From the foregoing it clearly appears that if there is any inconsistency between the decisions of our Supreme Court in the *Broderick* case and the *Alaska Pacific Steamship Company* case, then the decision in the former case has been modified

or overruled by the decision in the latter case. If either of these decisions is in point, then the latter case clearly establishes the law to be that a party who has collected his insurance may maintain an action as plaintiff against the party causing the loss and that such plaintiff is "the real party in interest" within the meaning of that expression as used in Sec. 179, Remington's Washington Code.

The case of *Illinois Cent. R. Co. v. Hicklin*, 115 S. W. 752, reviews all of the cases on this subject in states having code provisions which require that actions shall be prosecuted "by the real party in interest" and announces the law to be as follows:

"The sounder view is rather that it is enough to entitle plaintiff to maintain the action, as real party in interest if he has the legal title to the demand and defendants will be protected in a payment to or recovery by him. * * * In the case at bar the defendant did not ask that the insurance company be made a party to the action. It may be that, as between plaintiffs and the insurance company, the latter would be equitably entitled to the damages that plaintiffs recovered. The fact, however, that a third party might be entitled to the damages as between him and plaintiffs is not sufficient to bar the right of action by the plaintiffs. * * * As between the plaintiffs and the defendant the former were the real parties in interest. It is immaterial to the railroad company what may be the equities between the plaintiffs and the insurance company. All that it can demand is that a judgment in favor of the plaintiffs will be a complete defense to any further action for the same cause.

In our opinion the judgment in favor of plaintiffs is conclusive, and no action can now be maintained against the railroad company by the insurance company. Any right of action the insurance company may have is against the plaintiffs."

It thus appears that the plaintiff is "the real party in interest" if a judgment in his favor will be a bar to any action brought by any other party against the same defendant arising out of the same subject matter.

In this case clearly the plaintiff is the real party in interest. From the day the bills of lading were endorsed over and delivered to plaintiff the title to the goods and right to possession thereof were in plaintiff. The legal title to the goods thereupon became vested in plaintiff. Plaintiff subsequently, and prior to the institution of this suit, paid the drafts which had been guaranteed by letters of credit issued by the New York bankers. The bankers, having been paid in full, certainly have no interest in this case and could not maintain a suit against defendant. It is certain that the Insurance Company has never been in a position to institute a suit against defendant because it has never paid the loss. But assume for the sake of argument that defendant is correct in stating that the money advanced to plaintiff by Insurance Company was a payment and not a loan, and that the Insurance Company will receive the benefit of

any judgment plaintiff recovers in this case, still the judgment in this case will be conclusive on both plaintiff and the Insurance Company and will constitute a bar to any other action either of them might institute against defendant.

The Washington Code, Sec. 196, previously quoted, expressly provides that the court may determine any controversy between the parties before it when it can be done without prejudice to the rights of others, or by saving their rights, but if other parties are necessary for a complete determination of the controversy, then the court has jurisdiction to order them to be brought in. If the plaintiff in error (defendant below) deemed that it was essential, necessary or proper that other parties should be brought into the action, then it should have made application to the court to have such other parties brought into the action.

If the American Silk Spinning Company is not the real party in interest, then we do not know who is. Certainly the cargo underwriters have no claim against the railroad company as there never was any contract between them. The cargo underwriters have not taken a subrogation from the Silk Spinning Company for the reason that the cargo underwriters have never paid any loss under the policies of insurance and never were and are not

now entitled to any subrogation. The New York bankers who issued the letters of credit have no interest in this controversy for the reason that the Silk Spinning Company paid them in full long before this suit was ever instituted.

THE QUESTION OF OWNERSHIP.

The plaintiff in error in its brief, pages 60 to 67, presents the question of ownership of the silk at the time the contract of carriage here sued upon was made. They point out that at the time the bills of lading in question were, on August 7, 1918, endorsed by the New York bankers and delivered into the possession of the American Silk Spinning Company, the goods were not paid for and that the spinning company gave the New York bankers trust receipts in exchange for the bills of lading.

At the conclusion of the trial, plaintiff in error requested the trial court to make certain findings to the effect that the bankers took from the spinning company the said trust receipts, which trust receipts provided in effect that the merchandise belonged to the bankers until the purchase price should have been paid, and which purchase price was paid when the drafts came due at some later date. (See

plaintiff's requested fiudings of fact X and XI on pages 49 and 50, printed record). The trial court refused to make such findings, and the refusal of the court to make such findings is not a matter which may be reviewed by this court. This court has so held in the following cases: *Sayward v. Dexter Horton & Co.*, 72 Fed. 758; *Empire State Co. v. Bunker Hill Co.*, 114 Fed.; 417; *Los Angeles Gas Co. v. Western Gas Co.*, 205 Fed. 707; and the United States Supreme Court has so held in the case of *Stanley v. Board of Supervisors*, 121 U. S. 535.

The question of ownership, therefore, is not before this court. The trial court did not make any findings as to where the ownership of the goods in question lay, and the matter is now before this court in all respects as though any evidence relating to the question of ownership were entirely stricken from the record. This court will not make any new findings of fact at the instance or request of either party, and the trial court did not make any finding on the question of ownership. In fact the trial court refused to make any such finding, and, as stated above, its refusal in this respect is not open to review in this court.

This much is certain; as the trial court expressly found on the evidence fully and completely supporting such findings, that the bankers on August 7, 1918 endorsed and delivered to the spinning company the four bills of lading in question and thereupon the spinning company became entitled to the possession of the cargo therein described and in the absence of any finding of fact to the contrary, this court must and will assume that the possession of the bills of lading in the hands of the spinning company carried with it the title to the goods covered thereby. The arrangements made between Taylor, representing the spinning company, and Cheeney, representing the railroad, concerning the transportation of the silk in refrigerator-cars by silk train service was made subsequent to the time the bills of lading were delivered to the spinning company. The bills of lading were muniments of title and it is unquestioned that the spinning company were at all times the real parties in interest. Whether they paid for the goods at the time the bills of lading were delivered to them is immaterial. They agreed to pay for them, were liable for the payment, and, in fact, did make the payment when it fell due. It is a most common thing in business transactions for goods to be sold and delivered on credit and no one would question the

ownership of a purchaser in goods purchased by and delivered to him on credit.

Counsel for plaintiff in error desire this court to pass upon the provisions of a so-called trust receipt which is not in evidence and is not before this court. The law is that this court can not and will not consider or review such a matter.

In Volume 10, Corpus Juris, page 353, is found a discussion of the question of the right of one having a beneficial interest in the performance of a contract for the carriage to maintain an action for the loss or injury of the goods. The law is there stated as follows:

"One who has a special property or interest in the goods shipped, or a beneficial interest in the performance of the contract, is entitled to maintain an action for their loss or injury."

In the case of

Harrington v. King, 121 Mass. 269,

it appears that the goods in question had been delivered by the owner under a conditional sale contract to the plaintiff. The right of the owner to resume possession for a breach of the terms of the sales contract had not been exercised by him at the time of the alleged conversion of the property in question. The possession, therefore, was in the plaintiff. The court held:

"The possession, therefore, was in the plaintiff with the consent of the owner, and was not lost by the plaintiff when he left the goods in the house which he last occupied in the care of his brother. Upon the facts disclosed, the brother must be regarded with reference to these goods, as a servant or keeper whose possession was the possession of the plaintiff. This was enough to support this action even if the plaintiff is only to be regarded as a naked bailee. It is a leading principle that bare possession constitutes sufficient title to enable the party enjoying it to obtain a legal remedy against a wrongdoer, and accordingly it is held that a bailee without interest has a title arising simply from his possession sufficient to maintain trover against one who wrongfully invades that possession."

In the case of

Missouri P. R. Co. vs. Peru Co., 73 Kansas 295, 85 Pacific 408,

it is held that

"Where a consignee of goods is a commission agent or a factor for the consignor for their sale, he has such an interest therein as will entitle him to maintain an action against the carrier for the conversion of the goods or damage thereto by delay in transportation."

In the case of

Kirkpatrick v. Kansas City Railway Co., 86 Mo. 341,

the court said:

"The controlling question in this case is the right of plaintiff to maintain this action. On this point we entertain no doubt. * * * Moreover,

the plaintiffs paid the draft drawn on them and received the bill of lading to which the draft was attached, and subsequently purchased the wheat from the owner, Slaughter, they thus became the real parties in interest under the code. The fact that the screenings were destroyed prior to their absolute sale to the plaintiffs does not affect the proper conclusion to be reached. The property of Slaughter in the screenings still continued and was the subject of transfer to plaintiffs and they could maintain this action on the ground of a transfer, if on no other."

The court says, in the case of

Wolfe v. Missouri P. R. Co., 97 Mo. 473, 11 S. W. 49:

"Plaintiffs' right to maintain this action was made an issue by the answer. It is naturally the first subject of consideration. The goods in question were billed by the iron company to plaintiffs at East St. Louis. They received them there and in their own firm name contracted for their delivery at Pope's switch in St. Louis to themselves. They were acting as factors for the iron company in the transaction, having no pecuniary interest in the goods beyond their lien for commissions. By our Code of Practice it is provided that every civil action must be prosecuted in the name of the real party in interest, with certain exceptions. Among these is a 'trustee of an express trust,' who may sue in his name without joining the person for whose benefit the action is prosecuted. The statute explicity declares that 'a trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name a contract is made for the benefit of another.' Rev. St. 1879, Sec. 3463. Plaintiffs fairly come within this statutory definition. In this regard the Code merely designed to preserve a right of

action which existed by the common law of England on such facts as here appear."

The Code of the State of Washington provides *(R & B 1915 Code Sec. 180)*.

" * * * A Trustee of an express trust * * may sue without joining the person for whose benefit the suit is prosecuted. A trustee of an express trust within the meaning of this section shall be construed to be a person with whom or in whose name a contract is made for the benefit of another."

If for any reason this court should consider the American Silk Spinning Co. is not the real party in interest and entitled as such to maintain this action, then clearly it may maintain the action under the provisions of the Washington Code above quoted on the theory as advanced by plaintiff in error that it is "a trustee of an express trust."

The case of

Williamsport Hardware Co. v. Baltimore and Ohio Railroad Co., 77 S. E. Reporter 333,

was a case brought to recover damages for loss of and injury to parts of a shipment of machinery. The court held:

"No rule of pleading requires an averment of absolute ownership in actions of this character. A consignee or bailee, if not the true owner, has a special property in the goods sufficient to maintain an action; anyone having a beneficial interest may sue and recover, but the legal and reasonable presumption is that the consignee is the owner en-

titled to accept delivery at the terminal point and sue for failure of the carrier to deliver in good condition."

When goods are shipped under bills of lading consigned to a consignee therein named "or order" and the consignee endorses and delivers over the bill of lading, the endorsee immediately becomes vested with all of the rights of the consignee. Such was the situation in this case. When the Silk Spinning Company received from the consignee bankers the bills of lading duly endorsed by the consignee bankers, the Spinning Company by virtue of such endorsement thereupon immediately became possessed of all of the rights of the consignee bankers in and under said bills of lading. The court, of course, will bear in mind that the bills of lading were so endorsed and delivered to the Spinning Company prior to the time the goods in question were discharged from the steamer.

The case of *Atlantic Coast Line Railroad Co. v. Partridge*, 50 Southern 634, was a case brought to recover damages for alleged negligence of the carrier in transporting and delivering a car of pears. The question was raised as to the right of the plaintiff to maintain the suit. The court said:

"Be all these matters as they may, the great weight of authority seems to be to the effect that a bailee has such special property in the goods that

he may maintain an action for damage thereto and that anyone having a special interest in the goods may maintain the action, thus a factor, a broker, a warehouseman, carrier or any person employed to perform a service with respect to the goods of another with which he is intrusted for that purpose may maintain an action for the recovery of them or for any damage done them while he has charge."

The cases supporting the right of any person having a beneficial interest in the property to maintain the suit are so numerous that it seems to us the question is not open to discussion. A collection of authorities may be found in *Carter v. Southern Railway Co.*, 36 S. E. 308, 50 L. R. A. 354. *See also Williston on Contracts*, Sec. 960.

On page 64 of the Brief of plaintiff in error the case of *Northern Pacific Railway Co. v. Murray*, 87 Fed. 648, is cited in support of the contention that plaintiff can not maintain this action for the reason that the New York bankers did not assign to plaintiff their cause of action against the railway company. In that case it was held that a cause of action which had accrued in favor of one party could not be prosecuted by another unless the cause of action had been assigned to such other party. The case is not in point, however, for the reason that the damages which the Spinning Company seeks to recover in this case are based upon trans-

actions which took place after the New York bankers had endorsed and delivered the bills of lading to the Spinning Company. The cause of action herein questioned did not accrue prior to the time the bills of lading were so endorsed and delivered. This is not an action to recover damages resulting from the saturation of the silk by salt water prior to the time the silk was discharged from the steamer. This is an action to recover damages resulting from a contract of carriage consummated between plaintiff and defendant after the silk had been discharged from the steamer and after the bills of lading in question had been assigned to plaintiff.

On page 65 of the brief of plaintiff in error is cited the case of *Eastern Oregon Land Co. v. DeChutes*, 213 Fed. 897, in support of the contention that plaintiff can not maintain this suit because it is not the assignee of a cause of action which arose in favor of the New York bankers. The case is not in point. The plaintiff is not attempting to maintain this suit as an assignee of any cause of action which arose in faver of the New York bankers. The cause of action here sued upon arose subsequent to the time the bills of lading in question had been endorsed by the bankers and delivered to plaintiff. It is suing to recover damages resulting from the defendant's breach of a contract of carriage con-

summated between plaintiff and defendant after plaintiff became the endorsee of the bills of lading.

FEDERAL STATUTES

In all of the bills of lading in question the goods are consigned to the order of the New York bankers, and all of said bills of lading were endorsed by said bankers to the plaintiff by written endorsement on the bills as follows: "Please deliver to American Silk Spinning Company or order" and signed by the bankers.

Order bills of lading are defined by the Federal Statutes as follows:

"A bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is an order bill" (*U. S. Compiled Stats.* 1916, Sec. 8604-b).

By the Federal Statutes (*U. S. Compiled Stats.* 1916 Sec. 8604-nn) it is provided

"An order bill may be negotiated by the endorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such endorsement may be in blank or to a specified person."

The Federal Statutes further provide (*U. S. Compiled Stats.* 1916 Sec. 8604-p).

"A person to whom an order bill has been duly negotiated acquires thereby (a) such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith

for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value, and (b) the direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him."

By the Carmack Amendment (*U. S. Compiled Stats* 1916, Ser. 8604-a) a railroad receiving property for transportation from a point in one state to a point in another state and issuing a receipt or bill of lading therefor

"Shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it * * * *".

These statutes all apply to the shipment here in question, which was moving in interstate commerce, and clearly define the nature and character of the bills of lading in question, the manner in which order bills of lading shall be endorsed, the effect of such endorsement, the title acquired by the endorsee, and the liability of the carrier to the endorsee.

BENEFIT OF INSURANCE

A considerable portion of the brief of plaintiff in error is devoted to an argument in support of its contention that the American Silk Spinning Company is not the real party in interest and cannot prosecute this action by reason of a certain clause

in the bills of lading relating to insurance.

The trial court found (Finding of Fact VII) that each of the bills of lading contained stipulations of the following tenor: "Any carrier or party liable on account of loss of or damage to any part of said property shall have the right of subrogation for the full benefit of any insurance that may have been effected upon or on account of said property."

The trial court also found as a fact (Finding of Fact XVII) that the policies of insurance issued by the Atlantic Mutual Company on the cargo in question contained a clause as follows: "It is by the assured expressly stipulated in respect to land carriers that no assignment shall be made to such carriers of claim for loss or contribution of any kind under this policy, nor shall the right of subrogation be abrogated or impaired by or through any agreement intended to relieve such carriers from duties or obligations imposed or recognized by the common law or otherwise."

The policy of insurance in question was introduced in evidence and is found in the printed record at p. 654 as defendants Exhibit No. 28. The policy contains the clause last above quoted.

The trial court found as a fact (Finding of

Fact XVII) that the American Silk Spinning Company, on February 6th, March 7th, and March 12th, 1919, received from the Insurance Company $102,052.96 in the aggregate "as a loan pending collection of loss on 868 bales of silk waste ex steamer "Canada Maru" refund of the loan to be made to said Atlantic Mutual Insurance Company out of the proceeds of the collection specified. The receipts which evidence such loans are found in the printed record at p. 661, the same being defendant's Exhibit No. 29.

Plaintiff in error asserts that these moneys so loaned the American Silk Spinning Company by the underwriters were not in fact loans, but were outright and final payments made by the underwriters to the Spinning Company, in final satisfaction of and in recognition of the underwriters' liability under the insurance policy in question. The Spinning Company positively denies that such is the fact. Such was the issue as framed by the pleadings in the case. It, therefore, becomes necessary to review the transaction and the law applicable to it.

The insurance policy in question was an open policy in favor of the American Silk Spinning Company, Providence, R. I. With respect to shipments such as the one involved in this case, the policy con-

tained the clause above quoted. As heretofore stated, the bills of lading contain the clause above quoted. We, therefore, have a situation where the assured in the policy of insurance has stipulated that it will make no assignment to the carrier of the assured's claim for loss or contribution of any kind under the policy, and has further stipulated that the underwriters' right of subrogation shall not be abrogated or impaired by any agreement on the part of the assured intended to relieve the carrier from its duties or obligations. Notwithstanding such stipulations, however, the American Silk Spinning Company has accepted from the carrier a bill of lading which provides that the carrier, if liable on account of loss or damage to the property insured, shall, by right of subrogation have the full benefit of any insurance the Spinning Company may have effected on the goods described in the bill of lading.

It is interesting to note how this situation has developed. It is clearly the law that an underwriter who pays an assured the amount of his loss for goods damaged or destroyed through the fault of another, is, by virtue of such payment, subrogated to the rights of the assured to proceed against the party through whose fault the loss occurred. It therefore follows that upon receiving payment from

the underwriter, and by virtue of such subrogation, the assured cannot thereafter proceed against the party through whose fault the loss occurred. This for the simple reason that his rights to so proceed have passed by subrogation to his underwriter. The underwriter being so subrogated may proceed against the party through whose fault the loss occurred and so it happens that many carriers through whose negligence goods were damaged or lost, found themselves being sued for the amount of such damage or loss, by the underwriters, who had insured the goods, paid the owner the amount of such loss or damage, and taken a subrogation from the owner.

The carriers, seeking a means to avoid such suits, then began to insert in their bills of lading, clauses similar to the provisions in the bill of lading above quoted, to the effect that the carrier should have the full benefit of any insurance the owner might have placed on the merchandise lost or damaged. The courts were soon called upon to construe the legal effect of such provision, and the Supreme Courts of many of the states, and the United States Supreme Court held such provision valid.

It therefore became necessary for the underwriters to offset the effect of such bill of lading provision, and this they did by inserting in their policies provisions to the effect that the insured

would not make any agreement with the carrier whereby the carrier might have the benefit of any insurance the assured might place on the goods in transit. We have such a provision in the policy of insurance involved in this case, and the provision is quoted above. Courts have frequently passed upon the legal effect of these provisions in policies of insurance, and have sustained them as being legal. The substance of these decisions is briefly this:

That such a provision in a policy of insurance is a warranty and if, in the face of such a provision, the insured makes any agreement with the carrier, that the carrier shall have the benefit of such insurance, then the policy is voided and there is no insurance.

In the case of *Carstairs vs. Mechanics' & Traders' Ins. Co.* 18 Fed. 473, this identical question was passed upon in a suit brought by the owner of the goods against the insurance company upon an open policy of insurance on goods while in transit. The policy stipulated that the insurance company should, in case of loss, be subrogated to all claims against the carrier. Certain goods covered by the policy were destroyed in a railroad collision, having been shipped under a bill of lading which provided that in case of loss, by which the railroad company incurred any liability, the railroad company should

have the benefit of any insurance which might have been effected on the goods. The court held that the insured could not recover because the insured had, by the bill of lading, defeated the right of the insurance company to subrogate against the carrier, to which right the insurance company, under its policy, was entitled. The substance of the decision is contained in the last paragraph in words as follows:

"The insurance company, being practically in the position of a surety, (*Hall v. Railroad Cos.* 13 Wall. 367), and having a right to the subrogation, and the plaintiffs having, by the terms of the bill of lading under which they claim the goods, defeated that right, they cannot be allowed to recover in this action."

In the case of *Inman vs. S. C. Ry. Co.*, 129 U. S. 128 (32 L. Ed. 612), this situation is quite fully discussed. The plaintiff brought suit against the railway company for damages to cotton which, through fault of the carrier, was destroyed during transit. Defence set up the clause in the bills of lading, providing:

"The company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton," and alleged that the plaintiff had fully insured the cotton against the risk, but that defendants had not received the benefit of such insurance, nor had plaintiff given or offered to give it such benefit. The court, in passing on the matter, said:

"If this bill of lading had contained a provision that the railroad company would not be liable unless the owners should insure for its benefit, such provision could not be sustained, for that would be to allow the carrier to decline the discharge of its duties and obligations as such, unless furnished with idemnity against the consequences of failure in such discharge. Refusal by the owners to enter into a contract so worded would furnish no defence to an action to compel the company to carry, and submission to such a requisition would be presumed to be the result of duress of circumstances, and not binding. * * * * By its terms the plaintiffs were not compelled to insure for the benefit of the railroad company, but if they had insurance at the time of the loss, which they could make available to the carrier, or which, before bringing suit against the company, they had collected, without condition, then, if they had wrongfully refused to allow the carrier the benefit of the insurance, such a counterclaim might be sustained, but otherwise not. The policies here were all taken out some weeks before the shipments were made, although, of course, they did not attach until then, and recovery upon neither of them could have been had, except upon condition of resort over against the carrier, any act of the owners to defeat which operated to cancel the liability of the insurance. They could not, therefore, be made available for the benefit of the carrier. Nor have the insurance companies paid the owners."

In the case of *Pennsylvania R. R. Co. vs. Burr*, 130 Fed. 847, this question was before the Circuit Court of Appeals, Second Circuit. The bill of lading provided that the carrier should have the benefit of an insurance effected by the shipper. The shipper insured the goods, under a policy which

contained a provision that in case of any agreement between the assured and the carrier, whereby, in case of loss for which the carrier would be liable, the carrier should have the benefit of the insurance, there should be no liability on the policy beyond the amount which was not recoverable from the carrier. The goods were damaged in shipment, and the insurer advanced a sum to the owner, taking a receipt by which the owner agreed to prosecute his claim against the carrier, and to refund to insurer the amount collected. The court held that such advance was strictly within the terms of the policy, and did not constitute a payment of the loss whereby the carrier could claim the benefit under the bill of lading as a setoff in an action by the owner against the carrier to recover the damages.

In the case of *Bradley vs. Lehigh Valley R. Co.*, 153 Fed. 350, this question was again before the Circuit Court of Appeals of the Second Circuit. The bill of lading provided that in case of loss or damage to the goods the carrier should have the benefit of any insurance for or on account of the owner, and should be subrogated to its rights before any demand on account of such loss or damage should be made by the owner against the carrier. The shippers obtained a policy of insurance on the goods, conditioned that it should not inure directly

or indirectly to the benefit of any carrier by stipulation in bill of lading or otherwise. The goods having been lost by the carrier, the insurer advanced to the shippers an amount equal to the insurance, taking a receipt reciting that it was received

"as a loan without interest, and payable only to the extent of any net recovery we may make from the carriers responsible for the loss."

The court held that the provision of the bill of lading did not obligate the shippers to insure for the benefit of the carrier, nor, if they did insure, to effect such insurance as would protect the carrier; that the shippers were free to procure such insurance as they wished; that the advance made by the insurance company was not a waiver of the conditions of its policy, and did not extinguish the liability of the carrier, nor constitute a defense to an action against it to recover for the loss.

The regular provisions in the bill of lading and the insurance policy are quoted in the decision, and the court, in reply to the contention that the advances made by the insurance company to the shipper constituted a payment, said:

"The appellant insists that this transaction should be regarded as a payment of the loss, and operated to extinguish any right of Nourse & Co. to recover therefor. Treating the transaction as

a payment of the loss, it did not discharge the liability of the railroad company upon the theory of extinguishment. Payment of an obligation of another by a third party does not discharge it as between the original parties, unless the payment is made and received with the intention that it shall do so. * * * The real question is whether the transaction defeated the right of subrogation of the railroad company secured by the stipulation in the bill of lading. When the transaction took place, the insurance policy had become void at the election of the insurance company, because of the breach of the warranty. Although the insurance company was entitled to insist upon its right to treat its contract as nugatory, it could, if it chose, waive that right and treat the policy as a valid and existing one. By making an unconditional payment of the loss, it would have waived the breach, in the absence of some agreement or understanding to the contrary between the parties to the transaction. But the parties were at liberty to agree that the payment should not be unconditional, or that it should not operate as a waiver, or that it should be regarded as a loan or as a gratuity. The receipt indicates plainly that they did not intend the transaction to be an unconditional payment, or regarded as a payment of the loss in any sense. Its form was carefully devised for that purpose. It is industriously framed to show that the money advanced was not advanced in payment of the loss; and apparently to deprive the railroad company from obtaining any benefit from the insurance, and enable Nourse & Co., or some assignee or appointee of theirs, to recover the loss from the railroad company for the benefit of the insurance company. * * * That the insurance company did not intend to waive its right to treat the insurance as nugatory can hardly be questioned. The struggle between carriers and insurers to escape ultimate loss when insured cargo has been damaged or destroyed while in the custody of the carrier has resulted in

efforts by each to cast the burden upon the other by the insertion of astute provisions in their respective contracts with the shippers or owners of cargoes, and by availing themselves of every technical advantage to secure the benefit of their own provisions. To infer that an insurance company has intentionally foregone such an advantage would be to indulge in a violent and preposterous presumption. * * * The same reasons which forbid the enforcement of a stipulation requiring the shipper to insure for the benefit of the carrier would forbid the enforcement of one requiring him when he does effect insurance to procure such as will protect the carrier. The shipper cannot be circumscribed in his liberty to make such a contract with the insurer as he chooses. If he sees fit to make one which may be worthless to the carrier, it is his right to do so. * * *"

The latest case on this subject is *Luckenbach vs. McCahan Sugar Refining Co.*, 248 U. S. 139. In that case the provisions in the bill of lading and in the insurance policies there involved are quoted. The form of receipt, signed by the shipper, for moneys received as a loan advanced from the insurance company, is also set forth. After setting forth the form of said receipt, the court said:

"Upon delivery of this and similar agreements, the shipper received from the insurance companies, promptly after the adjustment of the loss, amounts aggregating the loss; and this libel was filed in the name of the shipper, but for the sole benefit of the insurers, through their proctors and counsel, and wholly at their expense. If, and to the extent that recovery is had, the insurers will receive payment or be reimbursed for their so-called loans to

the shipper. If nothing is recovered from the carrier, the shipper will retain the money received by it without being under obligation to make any repayment of the amounts advanced. In other words, if there is no recovery here, the amounts advanced will operate as absolute payment under the policies. * * * It is clear that if valid and enforced according to their terms, they accomplish the desired purpose. They supply the shipper promptly with money to the full extent of the indemnity or compensation to which he is entitled on account of the loss; and they preserve to the insurers the claim against the carrier to which by the general law of insurance, independently of special agreement, they would become subrogated upon payment by them of the loss. The carrier insists that the transaction, while in terms a loan, is in substance a payment of insurance; that to treat it is if it were a loan, is to follow the letter of the agreement and disregard the actual facts; and that to give it effect as a loan is to sanction fiction and subterfuge. But no good reason appears either for questioning its legality or denying its effect. The shipper is under no obligation to the carrier to take out insurance on the cargo; and the freight rate is the same whether he does or does not insure. The general law does not give the carrier, upon payment of the shipper's claim, a right by subrogation against the insurers. The insurer has, on the other hand, by the general law, a right of subrogation against the carrier. * * * It is essential to the performance of the insurer's service, that the insured be promptly put in funds, so that his business may be continued without embarrassment. Unless this is provided for, credits which are commonly issued against drafts or notes with bills of lading attached, would not be granted. * * * It is creditable to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice."

A discussion of this subject is also found in Poor on Charter Parties, Sec. 75, wherein the authorities are reviewed. It is impossible, however, to state the situation and the law thereto pertaining in clearer or more concise language than used by the Supreme Court in the Luckenbach case.

The money received by the American Silk Spinning Company from the Atlantic Mutual Insurance Company was a loan. It was not received as a payment for losses sustained by the spinning company and insured by the policy, nor was it paid by the insurance company with that intention or for that purpose. The wording of the receipts pursuant to which the money was loaned clearly indicate that the money passed as a loan. The trial court expressly so found that the money was received by the spinning company as a loan. (Finding of Fact XVII, Page 33-34 of record.) The receipts, which are in evidence as defendant's Exhibit No. 29 (Printed record Page 661) constitute evidence which fully supports this finding. The trial court, having found that the moneys so advanced constituted a loan, and there being in the record evidence to sustain such finding, the question is not now open to review in this court. It is not a question of law, but a question of fact, and the trial court has found the fact to be that the transaction

was a loan and, as above noted, the matter is not open to review in this court.

II.

THE CONTRACT BETWEEN CHEENEY AND TAYLOR FOR THE MOVEMENT OF THE GOODS FROM TACOMA BY SILK TRAIN IN REFRIGERATOR CARS WAS VALID AND BINDING ON THE DEFENDANT AND NO GOOD SUFFICIENT REASON IS SHOWN FOR DEFENDANT'S REFUSAL TO COMPLY THEREWITH.

The above heading, the Second Conclusion of Law as found by the trial court, is in direct conflict with the Second Conclusion of Law which the plaintiff in error (defendant below) requested the trial court to make as follows: "The defendant is not by any act or omission guilty of any breach whatever of the contract sued on herein."

The trial court found as a fact that there was a contract of carriage made between plaintiff and defendant (Finding of Fact IX, Printed Record P. 30), and as we have hereinbefore noted, there is ample evidence to sustain such finding. Therefore the question is not one which may be reviewed by this court. The trial court found as a conclusion of law that the said contract was valid and binding upon the defendant and no good sufficient reason

is shown by the defendant's refusal to comply therewith. It follows, as a matter of course, that the contract referred to by the court in its Finding of Fact and its Conclusion of Law is the contract upon which this suit was brought.

Plaintiff in error, nevertheless, has assumed that this court will review the question as to whether or not, as a matter of fact, there was any contract, and has devoted a considerable portion of its brief to argument of the matter.

It is contended that the Railroad representative Cheeney had no authority in fact or in law to make a contract on behalf of the Railroad Company with the Silk Spinning Company. Without waiving the position, which we firmly maintain, that the matter is not open to review in this court, we feel that the argument presented by plaintiff in error should be answered.

The defendant contracted to transport the wet waste silk by silk or passenger train service in refrigerator cars, and accepted the wet silk for shipment. The contract consisted of the original bills of lading as supplemented by the oral agreements made between Cheeney for the Railroad Company and Taylor for the American Silk Spinning Company. Cheeney was the defendant's representative on the dock. The trial court found as a fact (Finding IX) that he "was in charge of the dock

and the movement of freight therefrom" and that he was the "Chief Clerk of the Freight Agent at Tacoma". At the time Cheeney and Taylor made the contract, the cargo was on the dock. Cheeney saw the cargo and knew its condition. Cheeney ordered the refrigerator cars brought on to the dock. Cheeney caused several of the refrigerator cars to be loaded with the wet silk. Cheeney quoted the extra charges to be made. Under these circumstances it cannot be urged that Cheeney did not have authority to act for the defendant.

San Antonio & A. P. Ry. Co. vs. Timon, 99 S. W. 418. This was a case to recover damages to certain cattle, caused by reason of the failure of the railway company to furnish cars in which to transport them, in compliance with an oral agreement. The representative of the owner of the cattle stated he told the agent of the railway that he wanted ten or twelve cars in which to ship cattle on June 12th, giving the number of cattle and the point of destination, and the railway agent answered: "All right". The court said:

"That was an oral contract to furnish the cars at a certain date. It is too well settled now to require further discussion that a local agent having the power to contract for the shipment of cattle has also authority to agree with the shipper upon a time at which the cars necessary for that shipment shall be furnished. * * *"

There can be no doubt that an agreement was made by the agent of appellant to furnish the cars.

The court further goes on to quote with approval from an earlier leading case on the subject, and cites a number of cases sustaining the same principle of law, saying:

"In order to properly perform their duties to the public it is absolutely necessary that the agents of a railway company should have the authority to contract for furnishing cars on a certain date, especially in the shipment of cattle. It would be absurd to hold that shippers of cattle could not notify agents of dates on which they desired to ship and have them agree to have the cars ready, but that the shipper must carry his cattle to the station and hold them until the railroad company sees proper to furnish the cars."

In the earlier Texas case of *Easton vs. Dudley*, 14 S. W. 583, the court said:

"There must be a contract as to the time when the freight will be received, otherwise a shipper would never know when to deliver such freight as could be received only on the cars. Such contracts are made daily, and must be made by some one. The question is, who is to make the contract for the company? Naturally the station agent. He is there to represent the company, and does represent it, otherwise the shipper would be compelled to find some general officer clothed with the necessary power, who in most cases would be many miles away from the station. It is the duty of the company to have some one on the ground to represent it in this respect. It cannot be expected that the company should have a general officer at each sta-

tion for this purpose—this would be oppressive, and it would be equally oppressive upon the shipper to require him to make such contracts as must be made with some general officer of the company. * * * Such business must of necessity be transacted by the company's agent, and in fact is so done because it is a necessity. * * * Any reasonable man would naturally suppose that a railroad agent would have the authority almost essential in order for him to accomplish the purposes of his agency."

Other cases to the same effect are:

McCarty vs. Railroad Co., 15 S. W. 164;

Railway vs. Hume, 27 S. W. 110;

Railway vs. Jackson, 89 S. W. 968;

Railway vs. Irvine, 73 S. W. 540;

Chattanooga R. R. C. vs. Thompson, 65 S. E. 285;

Clark vs. Ulster & Delaware R. R. Co., 189 N. Y. 93;

Day vs. Ulster & Delaware R. R. Co., 186 N. Y. App. Div. 601.

Missouri Pacific Ry. Co. vs. Texas & Pac. Ry. Co., 31 Fed. 864.

Fort Worth & D. C. Ry. Co. vs. Strickland, 208 S. W. 410 (Texas Civil Court of Appeals);

Gulf C. & S. F. Ry. Co. vs. Jackson & Edwards, 89 S. W. 968 (T. C. A.);

Gulf C. & S. F. Ry. Co. vs. Irvine & Woods, 73 S. W. 540 (T. C. A.);

Gulf C. & S. F. Ry. Co. vs. Hume, 27 S. W. 110 (T. C. A.);

Railroad Co. vs. Pratt, 22 Wall. 124;
Harrison vs. Missouri Pacific Ry. Co, 74 Mo. 364.

Nichols vs. Oregon Short Line R. R. Co., 24 Utah 83; 66 Pacific 768;

Toledo, Wabash & Western Ry. Co. vs Roberts, 71 Ill. 540.

The general rule is stated in Vol. 10 C. J., P. 218, as follows:

"The station agent, having charge of a railroad company's business at a particular station, has implied authority to contract to furnish cars at a particular time for the shipment of goods, and the company will be bound by such contracts, even though in violation of the company's directions to the agent, if the limitation of his authority is not known to the shipper. * * * The station agent likewise has authority to bind the carrier to furnish a particular kind of cars. * * * It has even been held that such agent has implied authority to furnish cars for shipment to a destination beyond the carrier's line, and that, where the shipper has no notice to the contrary and relies on the appearance of authority, the contract made with the agent is binding on the company. A local station agent also has authority to arrange for loading and receiving cars for transportation."

In the case of *Pittsburgh vs. Racer*, 37 N. E., 380, the court said:

"The public, in dealing with the agent thus acting within the apparent scope of his authority, had the right to rely upon his apparent authority, notwithstanding some unknown limitations upon it."

The defendant having accepted the goods for

shipment under the contract, was bound to transport them, and such acceptance constituted a waiver of any right the defendant might previously have had to refuse to contract to transport the goods.

Cheeney knew the condition of the goods at and before the time he agreed with Taylor to transport the same. It is possible the defendant might have been justified in refusing to contract to transport the goods if it had reasonable grounds to believe that the same were dangerous and unsafe for transportation, but, have contracted to carry the goods, after seeing them and knowing their condition, it is bound to carry out the contract. This is a simple statement of law, and so generally understood and recognized that it is hardly necessary to dwell upon it. It is stated briefly and tersely in Vol. 13, C. J., p. 635, as follows:

"The general rule is that where a person by his contract charges himself with an obligation possible to be performed, he must perform it, unless its performance is rendered impossible by the act of God, by the law, or by the other party, it being the rule that in case the party desires to be excused from performance in the event of contingencies arising, it is his duty to provide therefor in his contract. Hence performance is not excused by subsequent inability to perform, by unforeseen difficulties, by unusual or unexpected expense, by danger, by inevitable accident, by the breaking of machinery, by strikes, by sickness, by weather conditions, by financial stringency, or by stagnation

of business. Nor is performance excused by the fact that the contract turns out to be hard and improvident, or even foolish, or less profitable, or unexpectedly burdensome."

Many cases are cited sustaining the text.

In Hutchinson on Carriers (3d Ed.), sec. 151, the law is clearly stated as follows:

"Although, however the carrier may in these cases refuse to accept the goods, if he take them into his possession for the purpose of carriage, without insisting upon his right to refuse them, he will be considered as waiving it, and consenting to accept the goods upon the usual terms as to liability, and will become responsible as an insurer as in other cases, but to impose upon him such extraordinary liability for goods which, from the nature of his business, he was not bound to carry, or which were in an unfit condition to be carried or which for any reason it would be unfair to require him to carry, an actual acceptance for the purpose of the carriage must be shown; and it will not be done where the delivery is merely constructive."

There can be no question that all of the goods in question were delivered into the possession of the defendant. The defendant owned the dock on which the goods were discharged, and the defendant received the goods from the steamer and piled them on its dock. They came into the possession of the defendant under the through bills of lading above mentioned. It is not a question, therefore, of constructive delivery, for all of the goods in question were actually delivered to the defendant. The question is whether or not the defendant ac-

cepted the goods. We think the proof is uncontradicted that the defendant did accept the goods, with full knowledge of their then condition, and after the making of the contract between Cheeney and Taylor. Not only did the defendant accept the goods, but, in pursuance of the contract, it actually ordered the refrigerator cars in which to transport them, and actually loaded approximately one-half of the goods in the cars. It would be hard to imagine a situation which more clearly than this shows not only an intention to accept, but an actual acceptance.

In the case of *Eastern Ry. Co. vs. Littlefield*, 237 U. S. 140, it appears the plaintiff ordered cars for a shipment of cattle, and the railroad accepted the order. The plaintiff brought the cattle to the station. The cars were not ready, and the court held the railroad company liable for the damages to the cattle, resulting from the failure to furnish cars and transport the same, saying:

"Where, without fault on its part, the carrier is unable to perform a service due and demanded, it must promptly notify the shipper of its inability, otherwise the reception of the goods without such notice will estop the carrier from setting up what would otherwise have been a sufficient excuse for refusing to accept the goods or for delay in shipment after they had been received."

In the case of *Hannibal R. R. Co. vs. Swift*,

12 Wall. 262, the plaintiff placed his baggage in a baggage car, in which car was also loaded ammunition belonging to troops traveling on the same train. The ammunition exploded, and the plaintiff's baggage was burned. The defendant railroad company claimed that there was fighting in the territory through which the railroad operated, and for that reason it would have been justified in refusing the plaintiff transportation. Hence it should not be liable for the loss to the baggage. The court said:

"If at any time reasonable ground existed for refusing to receive and carry passengers applying for transportation and their baggage and other property, the company was bound to insist upon such ground if desirous of avoiding responsibility. If not thus insisting, it received the passengers and their baggage and other property, its liability was the same as though no ground for refusal had ever existed. * * * It is enough to fasten a liability upon the company that it did not insist upon these reasons and withhold the transportation, but, on the contrary, undertook the carriage of men and property without being subjected to any compulsion or coercion in the matter."

In the case of *Pearson vs. Duane*, 4 Wall. 605, it appears that plaintiff had been banished from San Francisco by a Vigilance Committee under pain of death if he returned. In Mexico he boarded defendant's steamer, which was bound for San Francisco, and tendered the fare. The master, learning all the facts, transferred him in mid-ocean to a steamer returning to Mexico. The Court held that the

master, having undertaken to carry the plaintiff, and having raised no objection at the time he came aboard, could not thereafter justify his failure to carry out the contract of transportation, although the facts of the case mitigated the damages.

The court said:

"If there are reasonable objections to a proposed passenger the carrier is not required to take him * * * but this refusal should have preceded the sailing of the ship. After the ship had got to sea it was too late to take exceptions to the character of a passenger or to his peculiar position."

In the case of *Fort Worth, etc. R. R. Co. vs. Strickland*, 208 S. W. 410, it appears the plaintiff gave an order to the railroad agent for a car to be furnished for the shipment of poultry. The agent received the order, but through some difficulties in getting the car, it was not actually furnished until eighteen days after the specified date. It was contended that the order for the car was irregularly placed. The court said:

"A railroad carrier that accepts for transportation goods of a perishable nature, which require cars and equipment of a peculiar kind, undertakes, in the absence of some fact changing the nature of the undertaking, that it has such cars and equipment and that it will properly use them in the transportation of such property."

The judgment was for plaintiff.

The case of *Beard & Sons vs. Illinois Central Ry. Co.*, 79 Ia. 518, was an action against a connecting carrier for damage to butter. The initial carrier shipped the butter in refrigerator-cars. It was transferred to the first connecting carrier, which placed it in an ordinary car for a short haul, and then turned the shipment over to the defendant, which received the cars and transported them as they were, in consequence of which the butter spoiled. The court said:

" We may here assume that defendant will be excused from using refrigerator cars. But it is shown that the butter could have been carried safely by the use of ice in the box cars. It was defendant's duty to use it. But having accepted the butter for transportation, the defendant cannot escape liability for not safely transporting it on the ground that it did not have cars sufficient for that purpose."

The law on this subject is also clearly and briefly stated in Moore, on the Law of Carriers, at page 131, as follows:

"Generally, it may be said that if a common carrier has reasonable grounds for not receiving goods offered to it for transportation, it may do so; but if it once receives them, it will be considered as waiving its right to refuse them and as accepting them in the usual way, and becomes an insurer and subject to all liabilities of a common carrier, in the absence of special limitation of its liability in the contract of carriage."

And in VanZile on Bailments and Carriers, the law is stated as follows:

"But should the carrier accept the goods for transportation in cases where he might properly have refused to receive them, he will be held to have waived his reasonable and legal excuse for not receiving them, and thus becomes liable for any loss of or injury to the property, the same as in case of other goods; in other words, he will be held to have waived his special exemption from liability."

Defendant has failed to show or prove any legal excuse for its failure to perform the contract.

During the trial defendant introduced in evidence a pamphlet containing certain Interstate Commerce Commission Regulations relating to the transportation of explosives and other dangerous articles by freight and express. This pamphlet was published July 15, 1918, and the regulations therein contained respecting the particular matters hereinafter mentioned, were to become effective on September 1, 1918. The pamphlet in question was introduced in evidence as defendant's "Exhibit No. 25" and it is stipulated in printed record (P. 493) that the rules contained in the pamphlet did not become effective until September 1, 1918. There is also evidence in the case defendant's "Exhibit No. 25-A" which are the rules and regulations relating to the transportation of certain commodities in force under the orders of the Interstate Commerce

Commission of date October 1, 1914, being Rules 1801, 1803 and 1838, as set forth in said pamphlet, "Exhibit No. 25-A". These are the rules which were in effect at the time. It is contended that the contract of carriage in question is void and illegal because the same, in some manner not clearly pointed out, conflicts with certain of the above noted rules of the Interstate Commerce Commission in effect at that time.

The trial court found as a fact (Find XI, Printed Record P. 31) that the contract " was not prohibited by any regulation of the Interstate Commerce Commission" and such finding is not open to review in this court.

Much was said by plaintiff in error (defendant below) during the trial of the case, and much is said in their brief in this court concerning the effect of these provisions of the rules of the Interstate Commerce Commission upon the contract of carriage in question. Nowhere, however, has plaintiff in error pointed out any rule of the Interstate Commerce Commission in effect at the time which rendered void or illegal this contract of carriage.

The court's attention was particularly called to Sec. 1800, which states that for transportation purposes, dangerous articles other than explosives are divided into the following groups:

(1) Forbidden articles.

(2) Acceptable articles.

Section 1801 then proceeds to enumerate certain forbidden articles, amongst which we find:

(d) "Rags or cotton waste oily with more than five per cent of vegetable or animal oil, or wet rags, or wet textile waste, or wet paper stock."

This particular portion of the regulations was called to the attention of Dr. Arthur D. Little, a witness for plaintiff, at the time his deposition was taken on January 7, 1921. It is not necessary to quote from his deposition to show his education, experience and general knowledge in matters pertaining to the textile industry, and particularly to the chemical side of the industry. Suffice it to say that no witness has been produced who is possessed of a greater experience in and knowledge of the chemistry of the textile industry.

In his deposition, at Rec. p. 204, it appears the regulation above quoted was read to him, and he was asked the question as to whether or not Canton steam silk waste could properly or reasonably be qualified under any of the words used in the quoted regulation. In reply he stated:

"It is certainly not to be qualified as rags or cotton waste oily with more than five per cent of vegetable or animal oil, since the Canton steam

silk waste contains practically no oil, and has, moreover, not been processed in any such sense as rags or cotton waste. Neither can it be classed as wet rags or wet paper stock, nor as wet textile waste, for the reason, in the latter case, that it bears the same relation to cotton or other textile waste of that raw cotton or cotton linters does to the waste of the textile mills. It is in fact, although called a waste, a valuable and well recognized raw material for an important manufacture."

In describing cotton linters he states:

"In the operation of ginning cotton there is left behind a certain proportion of shorter fiber, which, when separated from the seed, is known as linters."

He defined Canton steam silk waste as follows:

"Canton steam silk waste is the product of the initial treatment of the cocoons in China, and consists of pieces of cocoons or material which otherwise cannot be drawn off into the filature."

He further states that Canton steam silk waste bears the same relation to raw silk as cotton linters bears to raw cotton. That silk waste contains the shorter fibers produced from the cocoon, and that it contains generally the same chemical materials as raw silk, and that it is the same material chemically.

It seems almost ridiculous to speak of Canton silk waste as being "textile waste". Textile waste is commonly known to be waste, or practically worthless scraps, sweepings and other useless or worthless remnants which accumulate in the process of

the manufacture of fabrics in the mills. Canton steam silk waste is not a worthless by-product, but a very valuable raw material. It does not accumulate during the process of the manufacture of silk fabrics in the mills. It is raw material. Naturally, silk in its raw state, is divided into classes or grades, the same as wheat or logs or other well known commodities. The mere fact that the word "waste" is used in the name "Canton steam silk waste", does not mean that the material is a "Textile Waste". No one would think of calling No. 2 grade wheat or logs worthless, nor would any one call No. 2 grade wheat "Waste Wheat" or "Wheat Waste".

It seems useless to prolong this discussion, as no witness has attempted to classify Canton steam silk waste of the kind and character involved in this suit, as "Textile waste".

Even though it were textile waste, the Interstate Commerce Commission Regulations in effect at the time did not prohibit its being shipped in its then wet condition.

Defendant seeks to excuse itself for failure to perform its contract to transport the silk in refrigerator cars, silk train service, because it believed there was danger of spontaneous combustion. This is no excuse at all. If it had any such be-

lief, or even reasonable grounds to entertain such a belief, it should have stood its ground and declined to contract to transport the materials and to receive and accept them for transportation. Having agreed to transport the goods with knowledge of their then condition, and having actually accepted the goods pursuant to such contract, it waived any right it might previously have had to decline to transport the goods for the reason it believed them liable to spontaneously combust.

Having contracted to transport the goods and having accepted them for transportation, it was bound to perform its contract. It cannot then offer the excuse that it believed there might be some danger from spontaneous combustion.

The question of whether there was any danger from spontaneous combustion is not open to review in this court. The trial court in its Finding of Fact XI (Printed Record P. 31) found "that at the time said 867 wet bales were accepted for shipment, as aforesaid, and at all times thereafter, the same were properly packed and in condition for safe transportation by defendant from Tacoma to destination by silk or passenger train service in refrigerator cars." There was ample evidence to sustain such finding. It is, therefore, an established

fact of the case and is not open to review in this court.

The facts in the case of *Spokane Valley Union vs. Spokane R. R. Co.*, 103 Wash. 587 (175 Pac. 184), are somewhat simlar to the facts involved in this case.

In the Spokane case the railroad company was held liable because, after a car which it furnished the shipper, was loaded by the shipper with apples, it refused to transport the fruit, because it thought the fruit was frost-bitten. The court said:

"It is apparent from this statement of the facts that after the apples were loaded on the car which was furnished by the appellant to the respondent, under Option No. 2, a dispute arose between the shipper and the agent of the carrier as to whether or not the apples had been frost-bitten. The carrier contended that the apples had been frost-bitten, and the shipper contended that they had not been frost-bitten. * * * The carrier refused to carry the apples. * * * The shipper thereupon offered to indemnify the appellant and its connecting carrier against any claim that might be set up against either by reason of any frost damage prior to the loading of the fruit. This offer was declined and the fruit was not shipped. The appellant argues that it had the right to make reasonable rules and regulations with reference to the carriages of fruit; that, when its inspectors found that part of the fruit had been frost-bitten, it had a right to have this notation made upon the bill of lading. If we may assume that, appellant could refuse to ship the fruit without a statement of its true condition. The claim that a part of the fruit was frost-bitten was

disputed by the shipper, which offered to indemnify the carrier against any claim for damage on that account. Under these circumstances, we think it was the duty of the carrier to accept the fruit and to carry it as requested by the respondent. The appellant is a common carrier of freight. It was bound to take all freight which was offered."

3. PLAINTIFF IS ENTITLED TO HAVE AND RECOVER FROM DEFENDANT DAMAGES IN THE SUM OF $105,622.90 WITH COSTS TAXED IN THIS ACTION, AND THAT A JUDGMENT IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANT SHALL BE ENTERED ACCORDINGLY.

The above is the third conclusion of law as made by the trial court (see printed record pp. 44-45). The making of such finding by the trial court is objected to by plaintiff in error as its assignment of error No. XXXII (see brief of plaintiff in error p. 32).

The plaintiff in error requested the court to make the following conclusion of law:

"The defendant is entitled to have a judgment in its favor that the plaintiff take nothing by its action herein,"

which conclusion of law the trial court refused to make, and to such refusal the defendant excepted and now assigns as error (assignment of error XVI, brief of plaintiff in error, p. 24).

It is manifest if the trial court was correct in making its conclusions of law Numbered 1 and 2, which are briefly to the effect that plaintiff is the real party in interest and entitled to maintain this suit, that the contract sued upon is valid and binding and no good and sufficient reason is shown from defendant's refusal to comply therewith, that the third conclusion of law as made by the trial court to the effect that the plaintiff is entitled to have and recover judgment from the defendant must stand, and it is not necessary to present any argument upon the matter.

WHEREFORE, having, as we believe, satisfactorily shown to this court that all of the findings of fact as made by the trial court were supported by competent evidence, and that the conclusions of law as made by the trial court should stand, and that the judgment in favor of plaintiff against defendant was properly entered, we respectfully urge that the judgment of the trial court should be affirmed.

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